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IN THE

Supreme Court of the United States

October Term, 1964

No. 269

ANTHONY PORTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on March 11, 1965 as amended April 22, 1965, and reported at 15 N.Y. 2d 235.

A. Opinions Below

No opinions were rendered below with the exception of the opinion of the Court of Appeals of the State of New York unanimously affirming the judgment of conviction. Said opinion is appended to this petition as Appendix A, and is officially reported at 15 N.Y. 2d 235.

B. The Grounds Upon Which the Jurisdiction of This Court is Invoked

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York, made on March 11, 1965, appended hereto as Appendix B, as amended on April 22, 1965 and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, §1257 (3) and Rule 19 subdivision 1 of the rules of this Court.

C. The Questions Presented For Review

(1) Was it prejudicial error and a deprivation of due process of law to allow the jury to consider the concededly coerced testimony of the prosecution witness Melville as to the alleged confession to him by petitioner Portelli?

(2) Was the taking of petitioner Portelli's fingerprints, after he was arrested and in custody and after the commencement of presentation of evidence against him to the grand jury, for the purpose of using said fingerprints against petitioner on his trial a deprivation of due process of law and a violation of petitioner's constitutional right to counsel and his privilege against self-incrimination?

(3) Was it a violation of due process of law to deny petitioner's application for a change of venue in the light of the extensive publicity attendant to the case?

(4) Was petitioner deprived of due process of law by the manner in which the trial jury was selected in that the Court and the prosecutor excluded jurors of the same

racial and ethnic background as petitioner and excluded persons who might have objective attitudes with respect to the imposition of the death penalty?

D. The Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the due process clause of the Fourteenth Amendment to the United States Constitution, and the Fifth and Sixth Amendments thereto. The pertinent portions thereof are set forth in Appendix D to this petition.

The statute involved is Section 165 of The New York Code of Criminal Procedure which is set forth in pertinent part in Appendix E of this petition.

E. A Concise Statement of the Case and the Material Facts Pertinent to the Consideration of the Questions Presented

Petitioner Portelli along with two co-defendants Jerome Rosenberg and Anthony Dellernia were indicted in the Supreme Court of the State of New York, Kings County for the crime of Murder in the first degree. The murders were alleged to have arisen during the course of a robbery in which two New York City Police Detectives were allegedly killed by this petitioner and his co-defendants. Trial was commenced on January 14, 1963 before the Hon. Samuel S. Leibowitz, a Justice of said Court and a special jury. The trial continued until the jury's verdict on January 29, 1963, by which verdict petitioner and Jerome Rosenberg were convicted of murder in the first degree as charged. The third co-defendant, Anthony Dellernia, received a mis-

trial prior to the case having been submitted to the jury. He was subsequently acquitted at his later trial.

On February 18, 1963, petitioner Portelli and co-petitioner Jerome Rosenberg were each sentenced to death in the electric chair.

Thereafter, and pursuant to the law of the State of New York, the conviction was reviewed directly by the Court of Appeals of the State of New York. As aforesaid, the Court of Appeals of the State of New York, unanimously affirmed the judgments of conviction of petitioner Anthony Portelli and Jerome Rosenberg. The judgment and accompanying opinion of the Court are appended hereto as aforesaid.

On April 19, 1965, the Hon. Charles S. Desmond, Chief Judge of the said Court of Appeals of the State of New York, ordered that the judgment and warrants of death be stayed pending the hearing and determination of this petition for certiorari.

On April 22, 1965, the said Court of Appeals amended its judgment to provide that the issues now being presented upon this petition were presented and necessarily passed upon with respect to questions under the Constitution of the United States—more particularly, the due process clause of the 14th amendment thereto, and that no constitutional right of petitioner's had been violated. (It might be noted at this point that the aforementioned Jerome Rosenberg who, along with this petitioner, was convicted and sentenced to death and whose simultaneous appeal was likewise affirmed by the Court of Appeals of the State of New York, is also filing with this Court a Petition for Certiorari to review the said judgment of the Court of Appeals of the State of New York).

For convenience of analysis, the specific facts as to each argument are set forth in more precise detail in the argument, *infra*.

F. The Stages of the Proceedings In Which the Issues Involved Were Raised and the Manner in Which They Were Raised

Each of the issues raised upon this petition were raised in the State courts as follows:

(1) The constitutional issue with respect to the coerced testimony of the prosecution witness Melville was raised by motion to set aside the verdict prior to sentence upon the ground that the testimony of the witness Melville should have been excluded from consideration by the jury (4262).* This constitutional issue was the main argument upon the appeal below.

(2) The issue with respect to the taking of petitioner Portelli's fingerprints for use as evidence against him at the trial was raised upon the trial by a general objection to the introduction of the evidence as to the fingerprints (1289-1290). The constitutional issue was urged upon the appeal below as a violation of the right to counsel and of the privilege against self-incrimination and also as a violation of due process of law.

(3) The issue with respect to a motion for a change of venue in light of the extensive publicity attendant to the case was timely made prior to the trial of the case. It was also renewed upon the trial of the case (216) immediately prior to the selection of the jury.

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* Numbers in parentheses refer to folios of printed Record on Appeal to the Court of Appeals.

(4) The issue with respect to the manner in which the Court and prosecution excluded jurors of certain racial and ethnic backgrounds was made during the selection of the jury. That issue was also raised upon the appeal below.

G. Argument Amplifying the Reasons Relied On For Allowance of the Writ

POINT ONE

It was prejudicial error and a violation of due process of law to allow the jury to consider the concededly coerced testimony of the witness Melville as to the alleged confession to him by petitioner Portelli.

It is our basic position herein that the use by the prosecution of testimony obtained through physical torture of the witness by police officers violates the constitutional guaranty of due process of law (U.S. Constitution, Amendment XIV). The Fourteenth Amendment governs any action of a State, "Whether through its legislature, through its Courts, or through its executive or administrative officers." (*Carter* v. *Texas,* 177 U.S. 442, 447; *Rogers* v. *Alabama,* 192 U.S. 226, 231; *Mooney* v. *Holohan,* 294 U.S. 103, 112-113).

The underlying facts are as follows:

Richard Melville was called as a witness for the prosecution (1539). He stated that he was married (1539) and had four children (1658). He had been a bookmaker (1658) and had also been convicted of receiving stolen merchandise in 1959, as a misdemeanor (1540).

On May 19, 1962, the day following the homicides, Portelli and two others came to his home (1557). A conversation took place between Portelli and one Frank Lino. Lino asked Baldy (Portelli) how he felt. Portelli replied that he "could still feel the ringing in my ears" (1559) Lino asked Portelli "why did you do it. Why did you drop the gun . . . are you crazy?" (1560) Portelli replied, "I panicked." He further stated that he took $300 from the register and Jerry (Rosenberg) took the rest (1561-1562).

MELVILLE further testified to Portelli's alleged description of how he committed the murders (1607-1609):

> "Q. I don't hear you. A. He sat down to watch television.
>
> Q. Who sat down? A. Me and Portelli.
>
> Q. In the course of watching television, was there a conversation between the two of you? A. Yes, sir.
>
> Q. Can you tell us what that talk was about? A. He was telling me—
>
> Q. Who was telling you? A. Portelli was telling me that he was outside the tobacco place—
>
> Q. Speak up louder. A. He was outside the tobacco place sitting down when two men got out of a cab and they went into the tobacco store and they came out and one of them stopped to look at him, and he said something to this other one, and they both got back in the cab, and they drove off and they made a turn, and Portelli had walked to the corner, and he looked for the cab, but the cab disappeared.
>
> So he walked back to the store, and they went in, and he was taking money out of the cash register and he heard a shot, and he saw two shadows coming in and he says that he panicked, and he drew his gun and started shooting, and that he ran to the back trying to get out, and the door was locked, and he ran

back to the front, and he dropped his gun, and he was running out yelling, 'Stick up, stick up.'

He told me that he was trying to make believe that he was a cop in case anybody was outside, and he started—he just took off.

Q. Was there any further conversation in the living room between the two of you? A. No."

MELVILLE further testified that about 10:30 (1712) that night he was forcibly taken by three detectives into custody at the police station for questioning (1654-1655, 1679). He denied knowing Portelli (1667). He was held in custody overnight although not arrested (1663). He remained in custody until late afternoon of the following day (1670). By that time he had given the police a statement similar to his testimony at the trial.

While in custody at the police station he was interrogated by eight or nine detectives (1682).

MELVILLE'S arm was twisted behind his back (1683), he was struck about the ears (1683), he was beaten in the back with a stick (1670), he was smacked in the head and back with open hand (1085, 1696). He continued to deny knowledge of the individuals involved (1693). He was moved from one room to another (1686, 1695, 1697).

Finally he was placed in a room with a bed and a table (1697). The detectives stripped him naked (1698). He lay face down on the bed (1700). He was beaten with a rubber hose and a wooden stick (1698). While he was being beaten he was questioned about Portelli. When he attempted to get up from the bed he was forced down on to it (1701). He continued to deny knowing Portelli (1702).

He was beaten on the testicles (1705). *Lighted cigarettes were applied to his back* (1716). He asked them to stop (1716). He was crying, frightened and in pain (1706). The beating while he was on the bed lasted about one hour (1704).

Finally sometime during the night (1713) he told them about Portelli coming to his house (1715). He was kept in that room all night. Different policemen came and went all night. He did not sleep that night (1712) nor was he fed (1714).

The following morning, about noon, he was taken from the police station to the District Attorney (1725), while handcuffed in a police car (1726). There he was questioned further by detectives (1728). From there he was taken to the Grand Jury. He was still frightened and in pain (1732-1733).

From that time, May 20, 1962, to the time of his testimony at the trial, January 21, 1964 (1958) a policeman had been continually in his apartment 24 hours a day. When his wife leaves the apartment to shop, a policewoman accompanies her (1734-1735). He never dicusses the case with either the policeman or the policewoman (1736). He stated that his testimony at the trial and before the Grand Jury was the truth (1750).

PORTELLI did not testify at the trial.

No testimony was offered by the prosecution to rebut Melville's testimony as to the torture described by him at the hands of the police.

The Court, in its charge to the jury, condemned the workings of the police, but nonetheless told the jury that

they could accept Melville's testimony as true even though they found it to be the product of the torture described by him. The Court, after reviewing Melville's account of Portelli's alleged statements as to how the homicides occurred (4134-4141), instructed the jury that they must first determine whether Portelli made these statements to Melville and then determine whether or not the statements amounted to a confession by Portelli to Melville (4141-4142). The Court further charged the jury (4149-4154):

> "Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him a unmerciful beating which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'give the works,' as they say, by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.
>
> "What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station

house, they deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the manner that Mr. Selzer did, and in the manner that the other attorneys did too. But *what about his testimony? Is his testimony to be ruled out, to be disregarded just because the cops gave him a beating, and for no other reason?*

"*The answer to that question is no.* It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.

"I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Immediately prior to imposition of sentence, Portelli's counsel moved to set aside the verdict upon the ground, among others, that Melville's testimony should have been excluded from consideration by the jury (4262). The motion was denied (4298).

As earlier stated, it is our position that no conviction—particularly one which directs the death of the accused—ought to be allowed to stand when an integral part of the underlying evidence was the conceded result of physical torture by police officials of the witness who ultimately gave that evidence.

Apparently this Court has never passed on the point at bar. Yet while precise precedent is lacking, principle most assuredly is not. The entire history of our jurisprudence, as distilled from reported opinions, militates against condoning judgments resting upon official violence and disorder.

There are fundamental and overriding considerations which rip asunder the very underpinnings upon which this conviction now rests. We refer, of course, to the vibrant frontiers of the Due Process Clause in Federal Constitution which embodies the concept that official brutality in any form is tainted by its own self-defeating poison. As stated by Mr. Justice Warren in *Spano* v. *New York,* at 360 U.S. 315, 320-321:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

The following year, the Supreme Court, in *Blackburn* v. *Alabama,* 361 U.S. 199, 207 (1960) said:

> "It is also established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of

> evidence, whether true or false.' * * * As important as it is that persons who have committed crimes be convicted, *there are considerations which transcend the question of guilt or innocence.*" (Italics supplied.)

Earlier, in *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205, the Supreme Court had applied the same principles in reversing a state conviction for possession of narcotics where the evidence of possession was obtained by extracting two morphine capsules from the defendant's stomach through the forcible use of a stomach pump causing him to vomit them up. In equating this variety of coercion with coerced confessions, Mr. Justice Frankfurter, writing for the majority held at 342 U.S. 172-174:

> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. *They are methods too close to the rack and the screw to permit of constitutional differentiation.*
>
> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principles that the States may not base convictions upon confessions, however

> much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. *Due process of law, as a historic and generative principle, precludes defining and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'.*" (Italics supplied). (See also, *McNabb* v. *U.S.*, 318 U.S. 332).

The cases teach that due process of law means more than the negative condemnation of evidence obtained by brute force—it includes with its protective ambit the affirmative command that law enforcement in a civilized society must itself be carried out in conformity to law. Put another way, there is no room anywhere within the scope of due process of law for a judgment of death built upon evidence obtained from tortured witnesses. These, too, are "considerations which transcend the question of guilt or innocence." (*Blackburn* v. *Alabama, supra.*)

Despite the apparent dearth of factually controlling precedent, there have been some peripheral expressions in the reported cases in direct support of our position. In 1941, Mr. Justice Frankfurter writing for the Court in *Hysler* v. *Florida*, 315 U.S. 411, was considering a petition for a writ of error coram nobis arising from a state conviction. The basis upon which relief was sought by the petitioner was that two prosecution witnesses had given false testi-

mony against him because they had been coerced and beaten. Mr. Justice Frankfurter said at 315 U.S. 413:

> "The guides for decision are clear. * * * if Florida through her responsible officials knowingly used false testimony which was extorted from a witness 'by violence and torture', one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony."

At every turn one finds opinion after opinion categorically refusing to give constitutional sanction to evidence obtained by official violence and brutality. Always the guideposts for rejection of such evidence are our national distaste for overreaching official misconduct and an acute awareness of its danger to our beloved liberties.

Mr. Justice Frankfurter, in *Malinski* v. *New York*, 324 U.S. 401,* (1944) said of official coercion at 324 U.S. 419-420:

> "The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law."

See, also:

Lisenba v. *California*, 314 U.S. 219;
Brown v. *Mississippi*, 297 U.S. 278;
Chambers v. *Florida*, 309 U.S. 227.

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* It is interesting and pertinent to note here that Mr. Justice Rutledge in a separate opinion dissenting in part, said, *obiter*, at 324 U.S. 431-432:

> "Due Process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion."

Mr. Justice Jackson, dissenting in *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944) said, "Interrogation per se is not, while violence per se is, an outlaw."

The testimony of Melville was no mere recital of some casual circumstance in the case. It was direct evidence—indeed the only evidence—of Portelli's alleged confession of guilt. If credited by the jury, it had the built-in capacity to resolve any and all reasonable doubts that might otherwise have existed in the minds of the jurors as to his guilt.

As we have demonstrated, the juridical principles underlying rejection of coerced evidence are universally applicable to all forms in which the evil may manifest itself. As such, those principles collide with a coerced witness' testimony with the same impact as upon a confession forcibly wrung from a defendant. Melville's testimony should never have been allowed to be considered by the jury.

POINT TWO

The taking of Portelli's fingerprints, after he was arrested and in custody, and after commencement of Grand Jury proceedings, for the explicit purpose of using the evidence thereof against him at the trial was a deprivation of his constitutional right to counsel and his privilege against self-incrimination.

The factual circumstances of this aspect of the case are relatively simple and undisputed.

On May 21, 1962, in the City of Chicago, a New York City detective arrested Portelli in connection with the investigation into the homicides (3094), that being the specific purpose for which he went to the Lido Motel in Chicago (3117). Portelli was returned to New York, after apparently waiving extradition (3121).

In the interim, on the afternoon of the homicide, a Detective O'Connor, assigned to the Police Laboratory, had taken

numerous fingerprint impressions at the scene of the crime, "for comparison value" (1308-1309). Included among the items examined at the scene for fingerprints were "assorted checks which were laying all over the floor" (1253-1254).

One of such checks, payable to The Boro Park Tobacco Co., was received in evidence over objection as People's Exhibit 25 (1289-1290). A photograph of the upper right hand corner of the check, showing a fingerprint, was received in evidence as People's Exhibit 47-A (1332) as was an enlargement thereof depicted on the left hand of People's Exhibit 50 (1405-1426).

On May 22, 1962, following Portelli's arrest, Detective Mandella, of the Police Bureau of Identification (1379) went to the 62nd Precinct in Brooklyn, where Portelli was already being held in custody (1393-1395). Detective Mandella had in his possession People's Exhibit 47-A showing the fingerprint on the check found at the scene of the crime (1395). This had been in his possession for several days (1446-1448). At the station house he took approximately twenty-seven prints of Portelli's fingers (1433) including eight or nine thumb prints (1479), reproduced on People's Exhibit 49 (1397).

Mandella then compared the print on Exhibit 47-A with a thumbprint of Portelli taken that day by him as shown on Exhibit 49 (1398-1399). He also subsequently examined enlargements of each print as shown on the right half of Exhibit 50 (1408, 1413). Upon the trial he testified as an expert that the fingerprint on the check, and the enlargement thereof, were identical with the prints taken by him of Portelli's thumb in the station house (1411, 1442-1444).

There can be no doubt from this record that when Portelli was arrested in Chicago on May 21st, and was in custody in the station house in Brooklyn on May 22nd, the judicial process as to him had already begun. *Indeed, on May 21st, the presentation of evidence against him to the Grand Jury had already been commenced* (1642).

Thus, when Portelli's fingerprints were taken *for the express purpose of using them against him as evidence to establish his presence at the scene of the crime,* he was not merely the focus of attention in a general investigation. He was in law and in fact the defendant arrested and accused of the murders at issue (*Escobedo* v. *Illinois,* 378 U.S. 478, 84 S. Ct. 1758).

It is our position that in the circumstances of this case, the taking of appellant's fingerprints was as much a deprivation of his constitutional right to counsel as the taking of his confession would have been (U. S. Constitution, Amendment VI, XIV, *Gideon* v. *Wainright,* 372 U.S. 335, 83 S. Ct. 792).

Our argument proceeds from two hypotheses, neither of which appear to have previously been the direct subject of any opinion in this Court, although there are opinions elsewhere in support of our position. The hypotheses propounded are (a) That the judicial process begins not only upon arraignment but at the time of arrest and formal accusation of the crime charged, such that a defendant's statement taken after arrest, but prior to actual arraignment is inadmissible in evidence, and (b) The principles applicable to post-arrest *statements* are equally applicable to post-arrest *taking of fingerprints*—at least when taken specifically for evidentiary purposes as distinguished from administrative or bail purposes.

The judicial process necessarily begins with the arrest because that is the first step by which a defendant is brought into Court. The making of an arrest *mandates* prompt delivery of the prisoner to a magistrate (New York State Code of Criminal Procedure, §165).

Assuming our position to be thus far correct, we turn to the next assumption as to whether the taking of fingerprints *explicitly for incriminating, evidentiary purposes,* is equivalent in law to the taking of a verbal statement insofar as the constitutional rights to counsel and due process of law are concerned.*

In *Bynum* v. *U.S.*, 262 F. 2d 465, a conviction for robbery was reversed where the defendant, almost immediately after arrest, was taken to police headquarters where he was booked and fingerprinted. He was thereafter indicted and upon his trial the fingerprints were given in evidence to prove that they were the same as those found at the scene of the crime.

The Court, finding that the arrest was unlawful, held that the fingerprints were, *a fortiori*, unlawfully obtained. The Court's reasoning proceeded from the holding that the taking of the accused's fingerprints for use as evidence upon the trial is subject to the same constitutional limitations as

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* By so stating, we do not overlook or abandon any argument that the constitutional privileges against self-incrimination are also infringed. We merely urge that the better reasoning proceeds from a regard to the underlying right to assistance of counsel. (See, *e.g.*, *People* v. *Hevern*, 127 Misc. 141, holding that the taking of fingerprints even for bail purposes violates the privilege against self-incrimination and due process of law. A contrary view was taken in the earlier case of *People* v. *Sallow*, 100 Misc. 447).

the taking of the accused's statement. The Court said, at pages 467 and 468-469:

> "In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative. In the cited cases judicial authority over the manner on which justice shall be administered is exercised in a way calculated to implement the constitutional guarantee.
>
> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed. Cf. United States v. Klapholz, 2 Cir., 1956, 230 F. 2d 494, certiorari denied 351 U.S. 924, 76 S. Ct. 781, 100 L. Ed. 1454. So we find in the DiRe case, the Upshaw case, the Mallory case and the case at hand a compelling common reason for reaching the same result. Therefore, we

conclude that the court below erred in admitting the fingerprints in evidence.

* * * * *

"Finally, it has been suggested that the controversy about a particular set of fingerprints here is much ado over very little because it would have been simple and proper to have taken appellant's fingerprints in court during trial in order to compare them with the prints said to have been found at the scene of the crime. It is also said the appellant's fingerprints, taken on a prior occasion, were in the possession of the Federal Bureau of Investigation and that these prints could properly have been used in this case. But this argument, like the argument of trustworthiness already discussed, simply does not meet the point. It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself truthworthy or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelvant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way."

At bar the fact pattern is the same. The difference—such as it may be—is that in the *Bynum* case the underlying illegality was a violation of the Fourth Amendment. At bar, the underlying illegality was a violation of the Sixth Amendment. Both are, under the Fourteenth Amendment, binding upon the States (*Mapp* v. *Ohio,* 367 U.S. 643;

Gideon v. *Wainwright, supra*). Each is governed by the same principle that action by State officials, resulting in a violation of a constitutional right, precludes the use in Court of any evidence thereby obtained. This superb principle is compellingly expressed in *Mapp* v. *Ohio, supra,* at page :

> " . . . the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* at 217."

We therefore urge that once the judicial process has begun (or, as denominated in *Escobedo,* the "adversary system") the right to counsel likewise begins. Common sense and ordinary experience demonstrate overwhelmingly that that point is born at the critical moment of arrest for the purpose of prosecution. It therefore follows that any information elicited from the defendant after arrest—whether testimonial, corporeal or otherwise—in the absence of counsel is constitutionally impermissible. The taking of fingerprints *for evidentiary motives* at that stage of the judicial process, is as much the taking of a statement as eliciting a verbalized admission by the defendant that he was present at the scene of the crime.

In the final analysis, once a suspect has become the defendant under arrest, the police have no further right to seek to make him the instrument of his own prosecution. Their sole function is to retain custody of him in order that he remain amenable to the process and jurisdiction of the Court.

POINT THREE

The petitioner was deprived of a fair trial by virtue of the extensive publicity attendant to the case.

Counsel for the petitioner moved before the Appellate Division for a change of venue. The basis of the motion was the inability of the defendant to obtain a fair trial as a result of the publicity. The motion and all of the 37 supporting exhibits were introduced into evidence as Defendant's exhibit 1 (216) and appear at folio 4486 to folio 4518 with exhibits mounted subsequently. The motion was denied by the Appellate Division and renewed upon the trial and denied by the Trial Court (216).

The crime involved occurred May 18, 1962. As indicated in the affidavit in support of the motion for change of venue, the day to day events received extensive coverage. All news media devoted extensive time and space to this crime. Of course the magnitude of the crime itself drew the attention of all the news media to this occurrence and the subsequent steps to "solve" the crime (Quotations supplied). Needless to say the apprehension of possible suspects drew equal if not greater attention. The defendant's apprehension, return and subsequent court appearances was intensively covered by the press, radio and television. If defendant had retained a press agent to obtain this coverage for him, he would have had to consider the job well done.

The papers (to use the vernacular) pulled out all the stops. Thus, Portelli's return from Chicago was headlined as "Triggerman Flown In From Chicago."

The trial commenced January 14, 1963. Between the date of the occurrence and the date of trial the pot, so to speak, was kept boiling. Crime magazines which are widely distributed in the metropolitan area published articles concerning this crime and the defendant's alleged connection with it. The magazines were published in September and October of 1962.

The newspaper and magazine coverage made wide reference to the prior police records of the defendants. This defendant was referred to as an "ex-convict" and it was mentioned that he could be charged with "Parole violation".

A study of the minutes of the *voir dire* of prospective jurors, indicates that the publicity did not occur in a vacuum. One hundred six prospective jurors were individually questioned. Of this group fifty-seven were asked if they had read about the case. Thirty-five of those questioned answered in the affirmative. In addition, three had a vague recollection, two a possible recollection, one heard about it, four did not remember and one made no answer. Thus out of fifty-seven questioned only eleven indicated that they had not heard or read about the case.

Eight other prospective jurors indicated prior familiarity with the case during the course of a general questioning of a new panel of prospective jurors. Eight (8) of this group in addition to acknowledging their prior information also admitted that it influenced their judgment (page 788, *et seq.* of the *voir dire*).

A number of the prospective jurors who acknowledged that they had read about the case, in response to question-

ing by the Court and various counsel, indicated that the publicity would not influence them.

> ". . . Merely going through the form of obtaining jurors' assurances of impartiality is insufficient." (*United States ex rel. Bloeth* v. *Denno,* 313 F. 2nd 364, 372 (1963) Cert. Denied 83 S. Ct. 1112.)

The Circuit Court of Appeals in *Bloeth* (supra) went on to set forth the duty of the reviewing Court, at page 372, in the following language:

> ". . . The reviewing court must determine, from a review of the entire voir dire, whether the extent and nature of the publicity has caused such a build-up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

In *Irvin* v. *Dowd,* 366 U.S. 719, 81 S. Ct. 1639 (1961) the Supreme Court, set forth the standards upon which the Circuit Court relied in *Bloeth* (supra). The Court in *Irvin* (supra) discussed the history of the entire question of an impartial trial, untainted by inflammatory publicity. The Court, in *Irvin,* reviewed all of the previous tests of partiality. The conclusion they reached at 366 U.S. 724-5 has application at bar:

> " . . . But as Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145-146, 57 S. Ct. 177, 185, 81 L. Ed. 78: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' "

In the instant case, of course, on the application to the Appellate Division, the voir dire relied upon in the *Bloeth* case (supra) was not before the Court. Before the trial court the motion was made before the voir dire commenced. Thus under previously cited authority the issue must be examined in the light of the voir dire.

Of the fifteen jurors ultimately selected in this case (including alternates) eleven acknowledged reading about the case, one was not asked the question, three answered negatively. All who read about the case indicated, of course, that they were not influenced thereby.

> " . . . How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio months preceding by matter designed to establish the guilt of the accused." (*Irvin* v. *Dowd, supra,* at 366 U.S. 729-30.)

The People as indicated in *Bloeth, supra,* would not have been prejudiced by a trial before an impartial and unaffected jury.

We feel that the following language from *Irvin* v. *Dowd,* at 366 U.S. 727-8 sums up defendant's position herein:

> " . . . Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards."

POINT FOUR

Petitioner hereby adopts the argument advanced by petitioner Rosenberg with respect to the conduct of the Court during the selection of the jury.

Petitioner further adopts any and all other arguments advanced by petitioner Rosenberg in his petition in so far as same may be applicable to petitioner Portelli.

CONCLUSION

The petition for certiorari herein should be granted.

Dated: Brooklyn, New York
June, 1965

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner Portelli

WILLIAM SONENSHINE, ESQ.
Of Counsel.

APPENDIX A

Opinion of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ANTHONY PORTELLI and JEROME ROSENBERG, Appellants.
Decided March 11, 1965.

Per Curiam. The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and, since we find no errors of law, we would have no occasion to write were it not for the testimony of police brutality which the record before us contains.

On May 18, 1962 two police officers, Detectives Luke Fallon and John Finnegan, were shot and killed in Brooklyn during the course of a holdup when they sought to apprehend the robbers. Upon the trial, held in January of 1963, one of the principal witnesses against the defendant Portelli was a small-time criminal by the name of Richard Melville. Called by the People, he testified that the defendant Portelli came to his home (with two other men) on May 20 and completely implicated himself in the homicides, describing how he participated in the robbery, how he shot the police officers and how he managed to get away. On cross-examination, Melville stated that later the same day several detectives took him to a police station for questioning and that, although he first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner.

However, he insisted from the witness stand that the pretrial statement which he made to the police, as well as his testimony, implicating Portelli was completely true.

It is the defendant's contention that the witness' testimony shoud have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury. (See 3 Wigmore, Evidence [3d ed., 1940], § 815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.

In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct.

The judgments of conviction should be affirmed.

Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Judgments of conviction affirmed.

APPENDIX B

Judgment of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR March 11, 1965.

Filed Mar 26 1965

Sup. Ct. No. 459

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Appendix B—Judgment of the Court of Appeals of the State of New York

Be it Remembered, That on the 26th day of December in the year of our Lord one thousand nine hundred and sixty-three, Anthony Portelli and Jerome Rosenberg, the appellants in this action, came here unto the Court of Appeals, by Evseroff, Newman and Sonenshine and Albert C. Aronne, and Maurice Edelbaum, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of conviction of the Supreme Court, Kings County. And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellant Portelli, and by Mr. Maurice Edelbaum, of counsel for the appellant Rosenberg, and by Mr. Aaron Nussbaum, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of conviction of the Supreme Court, Kings County, appealed from in this action, be and are hereby in all things Affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness

Richard Melville [see 15 N Y 2d 235] and (2) by other errors in the conduct and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Supreme Court.

THEREFORE, it is considered that the said original judgments of conviction be and are hereby in all things AFFIRMED as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, Kings County, before the Justices thereof, according to the form of the statute in such case made and provided.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, March 11, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk

APPENDIX C

Order Amending Remittitur of the Court of Appeals of the State of New York

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of April 1965.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 399

The People &c.,

Respondent,

VS.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Motions to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted, the return of the remittitur requested and,

when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness Richard Melville [see 15 NY 2d 235] and (2) by other errors in the conduct of and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Geabon Kimball
Deputy Clerk

APPENDIX D

Constitutional Provisions Involved

Fifth Amendment to the United States Constitution:

> "No person * * * shall be compelled in any criminal case to be a witness against himself. * * * "

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the United States Constitution:

> "Section 1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law.* * * "

APPENDIX E

Statutes of the State of New York

Code of Criminal Procedure:

> "§ 165. Defendant upon arrest, to be taken before magistrate. The defendant must in all cases be taken before the magistrate without unnecessary delay.* * *"

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IN THE

Supreme Court of the United States

October Term, 1964

No. 701

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

October Term, 1964

No.

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Jerome Rosenberg, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this capital case as hereinafter described.

Opinion Below

The opinion of the Court of Appeals, printed as Appendix A hereto, *infra,* is reported in 15 N.Y. 2d 235, 257 N.Y.S. 2d 931.

Jurisdiction

The judgment or decision of the Court of Appeals of the State of New York here sought to be reviewed bears date, under the "remittitur" practice of that Court, of March 11,

1965; its filing date in the trial Court is March 26, 1965; the remittitur was amended, to show the presentation and decision of Federal questions, on April 22, 1965 (see Appendices B and C hereto, *infra*). The judgment or decision affirmed, by a *per curiam* opinion (Appendix A hereto, *infra*), a judgment of conviction and order of execution rendered on February 18, 1963 by the Supreme Court of New York, Kings County (Honorable Samuel S. Leibowitz, J.), the petitioner having been convicted, after a jury trial, of two counts of murder in the first degree, the verdict being felony murder without a recommendation of mercy; the minutes of sentence and the order of execution appear in the printed "Record On Appeal" (which was printed for the appeal in the Court below) at pp. 61-64,* and they are printed in Appendix D hereto, *infra*.

As is more fully recited *infra*, petitioner Rosenberg duly preserved, in the State Courts, the Federal constitutional questions as to which we here seek certiorari, with the exception of our "Questions Presented" No. 3, *infra*, which arises from certain intervening decisions of this Court (*infra*).

---

* The certified Record which we are filing in this Court consists of the above mentioned printed Record On Appeal, a printed "Supplemental Record On Appeal", certain typewritten stenographic minutes (916 pages) of the voir dire for the selection of the trial jury, and the appropriate additional papers of the appellate proceedings in the Court below. We note that in the companion petition for certiorari herein of the co-defendant Portelli the references to the printed Record On Appeal seem to be to the "folio" numbers; our references in this petition are to the *page* numbers; of that printed Record. We have not been able to obtain sufficient extra copies of the printed Record and Supplemental Record in the Court below to supply nine additional copies to this Court, but we are expecting to obtain one or two extra copies which we shall send to the Clerk. No extra copies of the typewritten minutes of the Jury voir dire are available.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3),* since the petitioner is claiming rights, privileges or immunities under the Sixth and Fourteenth Amendments confrontation of witnesses, (due process of law and fair and impartial court and jury) of the Constitution of the United States.

Questions Presented

Petitioner was convicted and sentenced to death for felony murder allegedly committed in an armed robbery in which two New York City police detectives were fatally shot. The State does not claim that petitioner did the shooting, but that the co-defendant Portelli did. Identification of petitioner Rosenberg as having been present at the robbery and shooting was by a single witness and was based upon a fleeting and incomplete observation, the remainder of the proofs against petitioner being entirely circumstantial. The questions are:

1. Was petitioner denied due process of law and a fair trial by the admission in evidence of testimony by a witness named Richard Melville who had been savagely beaten by the police to coerce him to inculpate the defendants?

2. Was petitioner denied due process of law and a fair trial on the issue of his guilt or innocence by errors in the instructions to the Jury and by rulings and remarks of the Trial Judge which were not only prejudicially unfair but which, taken as a whole, were seemingly designed to militate in favor of a conviction? Was petitioner thereby

---

* Also under Rule 22, sub-division 1, of the Rules of this Court.

denied his due process right to be tried by a fair and impartial tribunal?

3. In connection with the above mentioned testimony of the witness Melville, which purported to recite guilty admissions by the co-defendant Portelli that were inculpative of petitioner as well, was petitioner denied his Sixth and Fourteenth Amendment rights of confrontation? (Not raised below, but sought to be raised here on the basis of *Pointer* v. *Texas,* U.S. , 13 L. Ed. 2d 923 and *Douglas* v. *Alabama,* U.S. , 13 L. Ed. 2d 934, both cases decided April 5, 1965).

4. Was petitioner denied his due process right to be tried by a fair and impartial jury and his right of a fair due process opportunity to receive a jury recommendation of mercy upon a conviction of felony murder? Was the trial jury selected by an unconstitutional procedure aimed at excluding persons who might have a truly objective attitude about a recommendation of mercy and, specifically, aimed at excluding persons of the same ethnic or racial background as the respective defendants?

5. Petitioner respectfully adopts, insofar as pertinent to his case, the additional questions presented in the companion petition of Portelli.

Constitutional Provisions and Statutes Involved

The case involves constitutional questions of due process of law (Fourteenth Amendment) and of the right of confrontation (Sixth and Fourteenth Amendments).

It also involves the New York State felony murder law (N.Y. Penal Law §1044, subd. 2) and the New York State statutory procedure (as it stood at the time of the sentencing herein) whereby a jury in a felony murder case might recommend life imprisonment rather than death (former N.Y. Penal Law §1045-a). These statutes are quoted in Appendix E hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

On the afternoon of May 18, 1962, two New York City police detectives were fatally shot in an armed robbery of a wholesale tobacco store in Brooklyn, N. Y. Persons present in the store at the time of the holdup and shooting testified that two men were involved. The petitioner Rosenberg and Portelli (who is filing a companion petition herein) were indicted, convicted and sentenced to death for this crime; a third defendant, Dellernia, obtained a mistrial. The Court below affirmed the convictions.

The case against petitioner Rosenberg individually rested upon only one item of direct evidence, plus circumstantial evidence. The direct evidence consisted of an alleged eyewitness identification of Rosenberg by David Goldberg, a partner of the business where the holdup and shootings occurred.* Goldberg's identification testimony, however, was undeniably of a rather weak kind. He said that he saw Rosenberg's face fleetingly during an instant when a handkerchief which the person in question had been holding up to his face was lifted away. Cross-examination brought out

* Rosenberg is not accused of doing the shooting, but of having participated in the robbery.

several questionable factors in Goldberg's identification testimony, including that he had seen a police photograph and newspaper pictures of Rosenberg before he had ever identified the latter at a police lineup. The pertinent portions of Goldberg's testimony appear at R. 187-198, 200-205, 239-241, 246-248.

The circumstantial evidence against Rosenberg included testimony that he had been seen in the neighborhood of the crime immediately after its commission, and that a pair of sunglasses and a rag used for disguise by one of the holdup men were found in a garbage can near where Rosenberg was seen right after the crime (R. 253-254, 300-305, 371-375, 719-720); that earlier that day Rosenberg had spoken, in the hearing of one Louis Ferrara, about a prospective robbery (R. 713-714); and that Rosenberg had driven in a car with Portelli and a third defendant (Dellernia) to the vicinity of the tobacco store shortly prior to the crime (R. 891, 893-900)—this last testimony was by a girl named Linda Manzione, whose testimony was received primarily against the defendant Dellernia, and it is noteworthy that in the retrial of the latter (after his mistrial herein) he was acquitted.

The additional testimony of Richard Melville—the testimony which had been elicited by brutal police beatings—is described under our "Reasons For Granting the Writ", *infra.*

Rosenberg did not introduce any evidence in his defense.

The defense moved to dismiss the indictment for failure to prove a *prima facie* case (R. 1061), and it moved for acquittal at the end of the entire proofs (R. 1215 et seq.). It also moved to set aside the verdict and for arrest of judgment (R. 1436). These motions imported the conten-

tion that Rosenberg's guilt had not been proved in view of the weak testimony of identification.

Under the practice of direct appeal to the Court of Appeals of the State of New York in cases of death sentence (*N.Y. Const.*, Art. 6, §7; *N.Y. Code Crim. Proc.*, §517), there is plenary review on issues of both fact and law (*People* v. *Crum*, 272 N.Y. 348, 6 N.E. 2d 51 (1936)). This plenary review in capital cases is available "whether any exceptions shall have been taken or not in the Court below" (N.Y. Code Crim. Proc. §528; *People* v. *Nelson*, 189 N.Y. 137, 81 N.E. 768 (1907)). In petitioner Rosenberg's appeal herein to the Court of Appeals of the State of New York he raised all of the points urged in this petition for certiorari except our "Question Presented" No. 3, *supra*, which rests upon intervening decisions of this Court rendered since the date of the judgment below which is here sought to be reviewed; see the item numbered "III" in our "Reasons for Granting the Writ", *infra*. As to our Question Presented No. 1 herein—relating to the physically coerced testimony of the witness Melville, this was raised as Point III in our printed brief in the Court below, it was passed upon in the per curiam opinion below (Appendix A, hereto, *infra*), and it was noted in the amended remittitur as having been raised and passed upon by the Court of Appeals as a Federal constitutional question (Appendix B, hereto, *infra*). As to our Question Presented No. 2 herein—relating to the prejudicial conduct of the Trial Judge—this was extensively argued *passim* throughout our printed brief in the Court below, especially at pp. 5-7 and in Points I, II, III and VIII of that brief, and the amended remittitur states that the defense urged "other errors in the conduct

and rulings at the trial" and that "The Court of Appeals held that no constitutional rights of appellants had been violated" (Appendix B, hereto, *infra*). As to our Question Presented No. 3 herein, this is the point here being raised for the first time, on the basis of intervening decisions of this Court, concerning denial of the constitutional right of confrontation. As to our Question Presented No. 4 herein—relating to improper selection of the trial jury—this was argued in Point VIII of our printed brief in the Court below, and it is covered by the language of the amended remittitur above noted in connection with our Question Presented No. 2 herein. As to our Question Presented No. 5 herein—adopting points urged herein in the companion petition of Portelli—we preserved such adoptive points in Points III, VI, VII and VIII of our printed brief in the Court below, we refer again to the amended remittitur, and we refer also to the showing in the companion petition herein as to the preservation of such points in the Court below.

Additional facts relating to the respective points herein urged as meriting certiorari are presented at appropriate places *infra* in our "Reasons for Granting the Writ".

The Court below, in affirming the conviction, discussed in its *per curiam* opinion only the point relating to the coerced testimony of the witness Melville, finding that while " * * * we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified", no prejudice had occurred because Melville had stated on the witness stand in his trial that his testimony was true, and "The requirements of law are met if the fact of such earlier coercion or other official lawlessness

is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open Court is truthful and worthy of consideration"; the Court of Appeals also held in its *per curiam* opinion that "The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and * * * we find no errors of law * * * *" (Appendix A hereto, *infra*). The judgment of the Court below affirming the conviction was unanimous (*ibid.*).

The sentence of death is stayed pending this certiorari proceeding.

Reasons for Granting the Writ

I.

In the companion petition herein on behalf of Portelli the facts of the savage and brutal police beating administered to the witness Richard Melville to force him to inculpate the defendants are recited in detail. The *per curiam* opinion below evidently accepted these facts as established and noted also that Melville declared he had given the police his story " * * * only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner" (Appendix A hereto, *infra*). Nevertheless, as we noted in our Statement of the Case, supra, the Court below was of the view that Melville's adoption on the witness stand in this trial of his pretrial statement to the police as true was dispositive. The Court below distinguished between such a situation involving a

non-defendant witness, and out-of-court confessions coerced from a defendant and sought to be used against him on the trial, saying that "While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury"—citing 3 *Wigmore, Evidence* [3d Ed., 1940], §815, pp. 230-231.

In this case of first degree murder with sentence of death, where we have at the most only one merest shred of "hard" evidence against Rosenberg,* fairness and justice require that the closest appellate scrutiny be devoted to ascertaining whether the scales in this trial were unlawfully tipped against Rosenberg by the obtrusion of any improperly received evidence, or by any misconduct of the prosecutor or the Trial Judge. We submit that precisely such a prejudicial tipping of the scales occurred in connection with the testimony of the prosecution witness Richard Melville (R. 513, *et seq.*).

Melville's testimony, as mentioned, is treated in detail in the companion petition of Portelli, where the circumstances are brought out which establish (undisputedly, we believe we may say) that Melville's testimony was of the basest order of credibility, and that he was brutally beaten by the police in order to force him to inculpate the defendants. We respectfully join in the argument of Portelli that the testimony of Richard Melville should have been excluded in its entirety by reason of its unlawfully coerced character. However, with particular application to the case of Rosenberg, we also urge as follows in regard to the Melville testimony:

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* The alleged David Goldberg "identification."

The function of the testimony of Melville in this case, from the prosecution's standpoint, was to bring out certain alleged incriminating admissions by Portelli, together with circumstances relating to the alleged flight of Portelli, after the robbery and homicide on May 18, 1962. We take it that it will not be disputed that the prosecution knew perfectly well in advance the story that Richard Melville was going to tell on the stand in this trial. The prosecution must, therefore, have known that Melville's account of Portelli's alleged admissions after the crime included an inculpating reference to Rosenberg. Since these alleged declarations of Portelli were not only after the event, but were altogether pure hearsay as to Rosenberg (who was not present at the alleged declarations), those alleged declarations of Portelli were, of course, absolutely inadmissible as to Rosenberg.* Nevertheless, the prosecution so designed its direct examination of Richard Melville as to have this inadmissible item concerning Rosenberg accidentally pop out, as it were, for the Jury's attention. Doubtless also because of the importance which the prosecution attached to the testimony of Richard Melville, the prosecution seems to have gone to special pains to develop a "show case" sort of preliminary background for that testimony by taking the witness through a rather lengthy introductory direct examination on numerous non-essential details, all with a view, obviously, we suggest, to orienting the Jury's minds in favor of the supposed "realism" of Richard Melville's

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* *Delli Paoli* v. *United States,* 352 U.S. 232, 239-241, and the dissenting opinion at 246-248; *Gambino* v. *United States,* 100 F. 2d 140 (C.C.A. 3, 1940); *People* v. *Robinson,* 13 N.Y. 2d 296; *People* v. *Fisher,* 249 N.Y. 419; Annotation, 1 L. Ed. 2d 1720 ("Admissibility As Against Conspirator of Extra Judicial Declarations of Co-Conspirator").

testimony. See R. 513-520 for this preliminary direct examination of Richard Melville which we claim was transparently designed to impart an air of synthetic naturalistic credibility to his testimony as a whole.

The real strategic purpose of the prosecution in all of this preliminary direct examination of Melville with its contrived air of verisimilitude, was revealed commencing at R. 520, where Melville began his description of Portelli's alleged admissions (made, allegedly, in Melville's home on the two days succeeding the commission of the crime). According to Melville, Portelli said he "could still hear the ringing in his ears," that "I panicked" (when asked why he had dropped the gun), and that he "only got 300" of the robbery loot (R. 520-521). Further according to Melville, Portelli was then asked (by one Lino, in Melville's presence), "What happened to the rest?" (R. 521). What came next—and what the prosecution must have well known was coming next—was the following (allegedly said by Portelli), "I took it out of the register * * * Jerry took the rest" (R. 521). Here, then, was the bombshell which was designed to blow up the chances of Rosenberg for a fair trial before the Jury—a completely improper and illegal hearsay inculpation of Rosenberg which could not but have the fatal result for which it must obviously been designed by the prosecution.

We contend that at that instant in the trial the Court should have immediately acted, *sua sponte*, to order a mistrial, notwithstanding the failure of defense counsel to do so. No corrective admonition to the Jury could conceivably undo the fatal prejudice of Portelli's above quoted inculpation of Rosenberg (see our last preceding footnote herein).

Instead of ordering a mistrial, however, the Court went through an elaborate "admonition" lecture to the Jury, in which the real net effect was to tighten the noose still more surely around Rosenberg's neck, thanks to the quite artful "instructional" language resorted to by the Trial Judge. Here is how the admonition to the Jury began (R. 521-522):

> "The Court: Wait a minute. Madam and gentlemen of the jury, I am going to ask you to pay strict attention to what the Judge is saying. Whatever Baldy* or Portelli said about somebody else, not he, is not binding on the somebody else.
>
> "Now, we heard here from the witness that the defendant Portelli said that *the defendant Rosenberg or Jerry got the rest. Is that correct?*
>
> *"The Witness: Yes, sir.*
>
> "The Court: Now, I instruct you in simple English that that is not the slightest bit of evidence in Rosenberg's case. It applies only to Portelli. Do you follow me. He could have said there Judge Leibowitz got the rest. That would be no evidence against Judge Leibowitz, what he said to somebody out there. What he said about himself may be considered by the jury, but not what he said about somebody else, and whether the somebody else is Rosenberg or Judge Leibowitz or the District Attorney or one of the lawyers who are trying the case, there is no evidence against any of us. Nor is this evidence against Rosenberg.
>
> "It may be considered only as against the defendant Portelli. That is the law.
>
> "Now, Mr. Foreman, I am going to ask you specifically, each one of you, did you understand what I said?" (Emphasis added)

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* "Baldy" is Portelli.

The above ostensible "admonition" to the jury deserves a rather close reading. Note how, to begin with, in the first of our above italicized items, the Court makes very sure that the Jury will understand perfectly well that the alleged reference to "Jerry" is to the defendant Rosenberg in this case—Melville's testimony in itself had not clinched this, but the Judge clinched it very well indeed. Second, note how the Court, not content with having elevated Melville's non-explicit words to the status of an explicit inculpation of Rosenberg, went on further in the next breath to drive the point home still more insistently by turning to say to the witness "Is that correct", to which the witness of course compliantly replied "Yes, sir" (R. 521-522). Having thus quite nicely tightened the noose around Rosenberg, the Court then went on with its "above the battle" judicial-seeming admonitory instructions to the Jury, then the Court went on to play out the further mummery of interrogating each of the Jurors individually as to whether each one of them "understands my instruction", "do you understand it clearly" "can you follow it", etc. (see the portion of the minutes at R. 522-525, which follows immediately after the conclusion of the item which we have above quoted).

But the Trial Judge was still not quite finished with his ostensibly high-purposed attentions to this matter. During the Court's above mentioned melodramatic interrogation of each of the Jurors individually, one of the Jurors happened to say that he understood the Court's admonitions, "but would you go back about three questions. He [Melville] dropped his voice and I lost track of what he said" (R. 524). To this the Court replied (with alacrity), "I am going to have it all read * * *" (R. 524). The Court then

continued its individual interrogation of the Jurors, and then, at R. 525 the Court said "One of the Jurors said that he did not quite catch what this witness said, and I am going to ask you to read, what was said there in the room * * *". *Thereupon the Court had the reporter re-read every word of Melville's above noted testimony concerning Portelli's alleged admissions, including, once again, the atrociously prejudicial item to the effect that "Jerry took the rest"* (R. 525-527) (Emphasis supplied).

The above conduct of the Trial Judge in relation to the Richard Melville testimony of Portelli's alleged inculpation of "Jerry" was inexcusable, the more so because it was entirely and easily avoidable.

In devoting so much attention to the Trial Court's prejudicial conduct in connection with the Melville testimony, we trust that we have not diverted attention from the fundamental injustice of the reception of this testimony at all in view of the police brutality without which, Melville uncontradictedly said, he would not have told the police the story.* The companion petition of Portelli notes that, while there is no authority directly in point on the admissibility of such coerced testimony of a non-defendant witness, the exclusion of such testimony would comport with the due process philosophy expressed in decisions of this Court which have dealt with related aspects of police coercion. This capital case is a proper vehicle, we submit, for announcement by this Court of a rule of constitutional fairness and decency which would put policemen on notice

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* As previously noted, this last statement of Melville was mentioned in the *per curiam* opinion below (Appendix A hereto, *infra*).

that such official savagery will not be countenanced in the investigation and preparation of criminal cases.*

II.

Occasionally in the legal or judicial history of a nation or a society the name of a particular judge becomes associated with some distinctive feature of the judicial processes of an era. In our time, in the State of New York, we have the distinctive juridical phenomenon known as the "Judge Leibowitz charge" to a jury. The Trial Judge in this case was the Honorable Samuel S. Leibowitz, Justice of the Supreme Court of New York, Kings County, a jurist of widespread and vivid reputation beyond the confines of his own State.

What is a "Judge Leibowitz charge"? For persons who have had occasion to read a fair number of "Judge Leibowitz charges", it is not difficult to recognize some of the basic characteristics of the phenomenon in question. A "Judge Leibowitz charge" is seldom, if ever, overtly or declaredly or explicitly unfair to a criminal defendant. On the contrary, a "Judge Leibowitz charge" is saturated with the explicitly declared avowals of the Judge to the Jury that his own spirit of fairness and his own freedom from prejudice about the case are matters of the intensest earnestness on the part of the Judge—so much so, indeed, as to cause discerning readers, in the subsequent leisure of per-

* The only authority to the contrary cited by the Court below is, as mentioned, §815 of *Wigmore* (pp. 230-231). This is one of Professor Wigmore's characteristic magisterial pronouncements for which no authority is cited by him which remotely reaches the kind of fact-situation of police savagery here involved, all of Professor Wigmore's cases involving no more than threats or inducements to accomplice witnesses.

using the printed record, to wonder whether Judge Leibowitz regards it (or wants his juries to regard it) as a unique or exceptional virtue in a judge that he should be fair-minded and unprejudiced. Or, perhaps, the more realistic way of describing the reaction of the discerning reader to a "Judge Leibowitz charge" is to say that the reader comes away with the nagging impression that the Judge "doth protest too much." Indeed, as one proceeds into a more detailed analysis of a "Judge Leibowitz charge"—the charge in the present case classically exemplifies the suggestions which we are here developing, as will shortly appear—the evidences of just such excessive protestation of the Judge's impartiality become more and more unmistakable. Such analysis of a "Judge Leibowitz charge" reveals, among other things, the following: There is usually present, in one manner or another, some adroit judicial maneuvering of the rule of reasonable doubt, the inevitable effect of which is to reduce drastically the benefit of that rule for the defense. There is also present, under the purport of a marshalling of the evidence, what amounts in net effect to a second summation for the prosecution—done, to be sure, with a sufficient subtlety so as to raise a good likelihood that the Honorable Judge in question will have the satisfaction of having been proved right in his familiar and charming prediction to defense trial attorneys that "I am going to see to it that you will not get away with your Point XII or XV or XX in your appeal brief," or words to that effect. In short, the main characteristic of a "Judge Leibowitz charge" is that its effect is to help convict the defendant in an atmosphere of declared judicial impartiality.

It is our respectful submission in this proceeding that the occasion is presented, in this death case of Jerome Rosenberg, for this Court to inquire, in the interests of preserving the principles of constitutional liberty and of authentic judicial impartiality, whether the phenomenon vernacularly known among the Bench and Bar of the State of New York as the "Judge Leibowitz charge," is intrinsically offensive to due process and to proper judicial administration, because in and of itself the very circumstance that a judge's charge to a jury in a criminal case is demonstrably designed in its entirety to produce a conviction of the defendant, cannot be countenanced.

The "hanging charge" which was given to the Jury in this case was itself, in turn, but the logical culmination and fulfillment of certain antecedent devices of judicial artfulness on the part of the Trial Judge herein during the conduct of the trial. The improper judicial conduct of which we here speak, then, encompasses both the Trial Judge's conduct of the trial as a whole, and his charge to the jury; so that, we are speaking of what may aptly be termed not only a "Judge Leibowitz charge" but also a "Judge Leibowitz trial."

In our discussion, *supra,* of the Trial Judge's artful handling of the coerced Richard Melville testimony in relation to Rosenberg, a prime example of the conviction-oriented techniques of a "Judge Leibowitz trial" was revealed. Let us now note how Judge Leibowitz oriented this trial in the crucial matter of the alleged identification testimony against Rosenberg.

That a man should be sentenced to electrocution for felony-murder in a case so thinly "proved" as was this

case, is shocking. The direct evidence against Rosenberg, i.e., the evidence that he was (allegedly) in fact present at the robbery which resulted in the killing of the two detectives, consists, literally and solely, of the "identification" testimony of the witness David Goldberg—who, it will be recalled, said merely that for a brief instant he had seen Rosenberg's face when the latter had the handkerchief or cloth slightly removed from his face at one fleeting juncture of extraordinary excitement and distraction. All of the other evidence relating to Rosenberg was, in the dilutest sense of the term, "circumstantial"—i.e., the generalized and vague "testimony" of Louis Ferrara and Linda Manzione* about some alleged planning of, or driving in an auto for the purpose of, a holdup or robbery to be done somewhere, the testimony of the several "neighborhood" witnesses who said they saw someone running in the neighborhood of the Brooklyn robbery who would have fitted (generally) the physical description of Rosenberg, the testimony about Rosenberg's having purchased clothing, etc.

It should not be lost sight of for one moment, we respectfully submit, that this is not a case of alleged premeditated murder by Rosenberg, but it is a case of felony murder—in which, moreover, there is presented that peculiarly anguishing situation of a defendant who did not do the killing but who nevertheless faces that hapless doom decreed under the Draconic felony murder law of New York. That a man *properly convicted* should be sentenced to electrocution for such a remote and consequential involvement is not, one is

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* This young lady's testimony was later recanted by her, and then the recantation was in turn recanted (Supplemental Record on Appeal, pp. 1-31, *passim;* R. 884-904, 931, 937, 981-982, 992-993).

unhappily obliged to acknowledge, contrary to the statutory law of the State of New York. But we cannot believe that this would allow a felony-murder conviction of the *present sort* to stand, i.e., where the entire evidential basis of the judgment turns indispensably upon "identification" testimony plus so-called "circumstantial evidence" of the quality involved in the present case, and where the record reveals such artfully conviction-designed instructions of the Trial Court to the Jury on the all-important issue of identification.

It is hardly necessary to cite authorities for the proposition, that, especially in this capital case, the Jury should have been instructed, on the issue of identification, that they should have taken into account whether the supposedly identifying witnesses saw the person merely momentarily or very briefly and at a time when the witness had no opportunity to exercise a complete and careful scrutiny; or that the supposed identifying witness, acting upon a rather small foundation of brief meeting and rapid observation, had reasoned himself, even though perhaps conscientiously, into a belief that the defendant was the man whom he saw; or whether such alleged identification was the result of a conclusion thus later developed by the supposed identifying witness and clouded by more or less doubt and uncertainty, rather than being an identification based upon reliable and decisive observation carried by a definite recollection of the witness to a conclusion by the witness whose correctness admits of no reasonable doubt. These instructions which we claim should have been given to the Jury—and were not (*infra*)—are obviously of the most acute importance in a case like this one where the charge is first degree murder that can result (and has) in

a sentence of death. Our foregoing suggestions as to the way in which the Jury should have been instructed in this case are adapted, primarily, from the language of *People* v. *Klvana*, 241 N.Y. 481. See also *People* v. *Seppi*, 221 N.Y. 62; *People* v. *Davino*, 284 N.Y. 486; *People* v. *Davino*, 288 N.Y. 423; *People* v. *Woltering*, 275 N.Y. 51.

We are obliged to quote in full the rather lengthy charge of the Trial Court herein on identification (R. 1367-1370):

> "Three people come here with identification evidence. Who are these people? The two Goldbergs and Mrs. Izzo. They are the only people who offer any identification after the alleged crime was committed—no, I should say during and after the time the alleged crime was committed. You will take each witness and decide whether or not the witness is truthful. Of course, unless you are satisfied beyond a reasonable doubt that you are dealing wtih a truthful witness, again I say, take his testimony and throw it into the wastebasket. Is the witness an honest man? Is Mrs. Izzo an honest woman? Is there any valid reason to doubt the sincerity of the particular witness under the general rules about credibility? Is the witness a truthful witness? Let us assume that you find that the witness is an honest witness. Then what? The second question that must be answered, and it is an important question, is whether the identification is accurate, whether it is reliable. In that regard you must consider all of the circumstances under which the identification was made. You must consider the opportunity that the particular witness had to observe the culprit at the time of the commission of the alleged crime; for how long a period was he under observation; how close did he get to the witness; what was the condition of the light?

Here is something important. Is the culprit's countenance such as would make a definite impression upon the mind of a witness? Do you know what that means? Is the face of a man the kind of a face that, figuratively speaking, would be 'lost in the shuffle,' lost in the mob, an ordinary face? Sometimes there are ordinary faces and sometimes there are faces that stand out, that one would be likely to remember. It is an important item.

You have seen these two defendants sitting here throughout the entire trial. Of course, the observation that was made there at the time was for a very short period of time; but you have seen the faces of these men. You have seen their stature when they stood up to leave the courtroom or when they were brought into the courtroom. Are their faces the kind of faces and their builds the kind of builds that a person is likely to remember; are they the types of individuals who are going to make an impression on the person who looks at them? That is an important think to take into consideration.

How about the individual himself, the person who is testifying? What kind of a person is that person? What is his background? What has been his experience in looking at and dealing with people? That is an important consideration. It is not conclusive, but it is something that a jury may take into consideration.

Who are these Goldbergs? What is their business? What kind of people are they? You have seen them on the stand. Are they rash or are they people who are careful in what they say? Take the lady. You are the sole judge as to her credibility. I am not telling you to believe her. I am not telling you not to believe her. The lady told us that she was a salesgirl and that she was also a cashier. It is for you to say

whether, in the light of her background, she is a person who was capable of observing people and remembering faces. Of course you must consider the circumstances that were then and there present. I am submitting all these questions to you. I am not stating my opinion one way or the other as to what you should do with the testimony.

Members of the jury, you must also consider upon the question of accuracy, the length of time which intervened between the date of the crime and the occasion when the witness saw the particular defendant at the time of the arrest, as having some bearing on the probability that he could remember the face of the defendant after such a lapse of time.

You must also take into account the witness' own capacity for observation, and his memory, and all other tests and standards which you may deem of importance, in addition to those which I have already enumerated.

I am not laying down any hard and fast rules for you as to identification. You have got to use your common sense. You people are people from a cosmopolitan community. You don't come from some hinterland, from some mountain retreat. You rub shoulders with your fellow man every day of your lives. You are people of experience. Now it is entirely up to you to apply such standards as you deem proper in judging as to the identification that was made by each of these witnesses, and of the particular defendant under consideration.

I charge you in the most forthright terms at my command, that there is the necessity for the use of the utmost caution and the utmost precaution in weighing proof as to identification. It must be with sufficient certainty so as to preclude every reasonable possibility of mistake. So much for the identifications."

The above quoted instruction on identification is a fascinating instance of the "Judge Leibowitz Charge". Observe the manifold artfulness of the above quoted instruction on identification. To begin with, by a process of verbal elision, the Jury are told that identification testimony came from "the two Goldbergs and Mrs. Izzo". To be sure, the Jury had previously been told, some pages farther back, that only one of the Goldbergs had identified Rosenberg, and that Mrs. Izzo had identified him as having been running in the neighborhood after the crime was committed, but now the Jury are told that "three people came here with identification evidence * * * the two Goldbergs and Mrs. Izzo". *Second,* observe the obviously rhetorical nature of the questions which the Judge invites the Jurors to ask themselves—"Is the witness an honest man? Is Mrs. Izzo an honest woman? Is there any valid reason to doubt the sincerity of the particular witness under the general rules about credibility?" *Third,* using the portentous prefatory words, "Here is something important", the Court goes into an obviously "hinting" invitation to the jury that they should bear in mind the supposedly or allegedly distinctive type of features or facial countenance of the defendant Rosenberg. *Fourth,* how eminently "fair" to "both sides" is this following treatment in this typical "Judge Leibowitz Charge"—"Of course, the observation that was made there at the time was for a very short period of time; but you have seen the faces of these men * * *. Are their faces the kind of faces and their builds the kind of builds that a person is likely to remember * * *. That is an important thing to take into consideration." *Fifth,* this patently conviction-inducing jury "instruction" on

"identification" intones supposedly objective questions as to the qualifications of the observing or identifying witnesses—"What has been his experience in looking at and dealing with people? That is an important consideration * * *. Who are these Goldbergs? What is their business? What kind of people are they? You have seen them on the stand. Are they rash or are they people who are careful in what they say? Take the lady * * *. The lady told us that she was a salesgirl and that she was also a cashier. It is for you to say whether, in the light of her background, she is a person who is capable of observing people and remembering faces."

When a jury is given, by the prestigious authority of a Trial Judge (who happens moreover to be a nationally famous judicial personage in his own time), this sort of "hidden-persuader" or "subliminal" kind of conviction-inducing instructions, is it realistic to expect that the jury will preserve their independence of judgment and mind by the Judge's lip-service use of such perfunctory expressions as "you are the sole judge as to her credibility. I am not telling you to believe her," or, "It is not conclusive, but it is something that a jury may take into consideration", or, "I am submitting all these questions to you. I am not stating my opinion one way or the other as to what you should do with the testimony", or, "I am not laying down any hard and fast rules for you as to identification". Nor is it any more likely that such a Jury, subjected to such a masterly piece of judicial brainwashing, would be particularly deflected from its compliancy with the Judge's own seeming preference by the *pro forma* words at the end of the charge on identification, to the effect that the Jury must use "utmost caution", etc., in determining the issues of identification.

It is submitted that Rosenberg was denied a fair due process trial on the crucial issue of his identification as an allegedly guilty participant in the crimes charged.

III.

The decision of the Court of Appeals of the State of New York which is here being sought to be reviewed was rendered on March 11, 1965. On April 5, 1965 this Court decided *Pointer* v. *Texas,* U.S. , 13 L. Ed. 2d 923 and *Douglas* v. *Alabama,* U.S. , 13 L. Ed. 2d 934, making applicable to the States for the first time, *via* the Fourteenth Amendment, the Sixth Amendment obligation of according to criminal defendants the right of confrontation of accusing witnesses. In our description *supra* of the Richard Melville testimony of alleged extra-judicial admissions by the co-defendant Portelli which allegedly inculpated petitioner Rosenberg as well, we noted that the admonition to the Jury that Portelli's admissions were not binding as to Rosenberg were not only intrinsically ineffective,* but in fact seemed to have been unmistakably calculated to accomplish exactly the opposite, namely, to "rub it in" that Portelli had allegedly inculpated "Jerry" (i.e., Rosenberg). In these circumstances we respectfully invoke the rule of the *Pointer* and *Douglas* cases, *supra*—especially the latter, whose facts significantly resemble ours as respects denial of the constitutional right of confrontation. For in *Douglas* the prosecution effectively brought to the Jury's attention an out-of-court confession of an accomplice as to whom, this Court found, the defendant on trial

* For the reasons so vigorously noted in the dissenting opinion in *Delli Paoli, supra.*

did not have a proper constitutional opportunity of confrontation or cross-examination. Likewise in our case Rosenberg of course had no such opportunities in regard to the alleged extra-judicial admissions by Portelli as testified to by Melville. Portelli did not take the stand in this case.

Not only, then, do we earnestly believe that the rule of the *Pointer-Douglas* cases is fairly applicable to this case of Jerome Rosenberg—which, moreover, is a death sentence case as neither *Pointer* nor *Douglas* were—but indeed we think that, in an overall due process aspect, our case calls the more compellingly for the applying of the *Pointer-Douglas* rule when it is remembered that the entire business of the alleged Portelli admissions came into the record of this trial only through the atrocious circumstance of the witness Melville's having been savagely tortured by the police in the first instance to get him to give a pretrial statement which he swore on the stand in this trial he would never have given if he had not been thus brutally coerced. The combination of these extraordinarily offensive features —the police beating of the witness Melville, the denial of the right of confrontation, and the sly way in which Rosenberg was deprived of the benefits of the rule of non-bindingness as to him of Portelli's alleged hearsay admissions— cries out for certiorari redress in the interests of Fourteenth Amendment due process.

IV.

Certiorari is merited here also by the circumstances of the selection of the trial jury, which we respectfully contend was selected by an unconstitutional procedure aimed at excluding persons who might have a truly objective atti-

tude about a recommendation of mercy in the event of a conviction of felony murder and, specifically further, to exclude jurors of the same ethnic or racial background as the defendants.

(The typewritten stenographic minutes of the *voir dire* of the prospective trial jurors in this case are a part of the certified record herein. Our discussion below will refer to the pages of the typewritten minutes as "S.M. ".)

The *voir dire* in this case was most unusual. The questioning of the prospective jurors by the prosecutor and the Court displayed a most peculiar pattern in regard to the matter of conscientious scruples about the felony murder death sentence for defendants who did not do the actual killing. In the first place, there was a really extraordinary amount of such questioning in this *voir dire,* but of perhaps greater interest is the fact that this excessive questioning seemed to occur above all whenever the prospective juror happened to be of apparently Jewish or Italian extraction. The conduct of the prosecutor and the Court in this *voir dire* seemed to have a two-fold purpose, namely, to pack the Jury with persons who could be counted upon to be inclined against a recommendation of mercy under a verdict of felony murder, and to keep off the jury Jews and Italians upon an ostensible showing that they entertained conscientious scruples about the felony murder death sentence—after the Jewish and Italian prospective jurors had been subjected to especially prolonged and intense questioning on that subject.

Rather than to engage in further characterization of this remarkable *voir dire,* we invite this Court to see the pertinent details of the situation for itself, and in order to make

this more convenient for the Court we are setting forth below a summary of the examination of each prospective juror, with page references to the stenographic minutes:

In the Court's preliminary questioning of the first panel of talesmen, persons having any conscientious scruples against the infliction of the death penalty were directed to come forward; we note that the Court repeated this question six times, observing that each time the question was asked more persons were coming forward (S.M. 35-36). Right after this the Court further interrogated several of the talesmen who had come forward on the ground of the above mentioned conscientious scruple, all in the presence of the panel (S.M. 36-44). Then the Court again interrogated the entire panel at large on this subject (S.M. 44-45).

As an indication of the thoroughness—to say the least—with which the Court had thus gone about weeding out from the panel any person who might really fall under the statutory ban as regards such conscientious scruple*, we note that the defense felt it necessary to object to "the excessive repetition and the manner in which the Court asks this question concerning this point" and a motion was made for the discharge of the panel and a mistrial (S.M. 46).

We are calling attention to this extraordinary thoroughness of the Court's advance weeding-out of the panel, because this helps to underscore, we believe, the later prejudice that occurred when numerous additional talesmen were rejected in circumstances plainly indicating that the prosecution and the Court did not want them for fear that they might be open-minded on the question of a recommendation of mercy under a felony murder verdict.

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* N. Y. Code Crim. Proc., §377.

At S.M. 57-59 the prosecutor, in examining the first talesman, Charles Jensen, went through a detailed interrogation to make sure that the talesman would be willing to convict, in a felony murder prosecution, co-defendants who did not do the actual killing. Jensen was excused for reasons of health (S.M. 65).

Talesman Ian J. Cook was challenged for cause on the ground that he said that he would have difficulty applying the felony murder law against defendants who did not do the killing. Talesman Howard S. Hale was challenged for cause by the Dellernia defense as having formed an opinion from newspaper reading (S.M. 71-106). Octave H. Westbrook was accepted on the jury (S.M. 106-145). He was agreeable to applying the felony murder law (S.M. 109-111). Harold N. Youngleib was peremptorily challenged by the People, evidently because one of the defense attorneys was acquainted with a cousin of Mr. Youngleib (S.M. 146-147). Raymond I. Wilkinson was challenged for cause by the Dellernia defense on the ground of newspaper knowledge, and this challenge being overruled, Wilkinson was peremptorily challenged by the defense (S.M. 147-176).

(To avoid repetition, we are refraining from mentioning that nearly every talesman was being asked throughout by the District Attorney about his willingness to apply the felony murder law.)

Thomas G. Weber was accepted for the Jury (S.M. 177-190); he was willing to apply the felony murder law (S.M. 178). Israel Wertenthiel was peremptorily challenged by the People without even being questioned by them (S.M. 192-195). Dorothy Williams was peremptorily challenged by the People before questioning by any party (S.M. 195).

William Kastner, although he said he would apply the felony murder law (S.M. 199) and swore that he had no questions and no hesitation about the death penalty (S.M. 202), was peremptorily challenged by the People (S.M. 196-213). Stanley Kesnoskie was peremptorily challenged by the defense (S.M. 213-222). Andrew F. Finch, Jr., was challenged for cause by the defense on the ground of newspaper knowledge, this challenge was overruled, and the defense peremptorily challenged Mr. Finch (S.M. 222-235). William L. Siegel, was peremptorily challenged by the People after only a brief and perfunctory questioning by them (S.M. 235-239). Edwin S. Thurber was peremptorily challenged by the defense (S.M. 239-244). Bernard Schwartz, after saying that he would give special credence to police witnesses, was excused by the Court (S.M. 245-246). Ernest Nason was peremptorily challenged by the defense (S.M. 247-257). John J. Condon was peremptorily challenged by the defense (S.M. 258-277). William A. McCaa was accepted for the Jury (S.M. 278-287). Otto H. Shneeloch was peremptorily challenged by the defense (S.M. 287-291). Thomas L. Clevenger was accepted for the Jury (S.M. 291-308). Mrs. Ethel Taylor was peremptorily challenged by the People (S.M. 308-309). Henry Banks was peremptorily challenged by the People (S.M. (309-310). Renee H. Sachs was peremptorily challenged by the People (S.M. 311-312). John J. McKenna was peremptorily challenged by the defense (S.M. 312-322). Michael Feinbloom was peremptorily challenged by the People after short, perfunctory questioning (S.M. 322-323). Clayton H. Ward was peremptorily challenged by the defense (S.M. 331-347). Irving O. Sager was peremptorily challenged by the prosecution (S.M. 347-348). Alex-

ander J. Mitchell was excused by consent as being a friend of an Assistant District Attorney (S.M. 348-350). Robert S. Burch was accepted for the Jury; he was willing to apply the felony murder law (S.M. 350-360). Michael S. Cassidy was peremptorily challenged by the defense (S.M. 360-367). Julia M. Walworth was peremptorily challenged by the People (S.M. 367-368). John J. Guiliano was peremptorily challenged by the People after short perfunctory questioning (S.M. 368-371). William H. Meyer was peremptorily challenged by the defense (S.M. 371-372). Lewis Burns was peremptorily challenged by the defense (S.M. 372-378). Francis J. Mooney was excused by the Court after saying that he felt prejudiced against the defendants (S.M. 378-379). Ethel Katz was challenged for cause by the People on the ground that she expressed a conscientious scruple against applying the felony murder law to defendants who did not do the killing; we note that the District Attorney and the Court seem to have made a particular point of questioning Mrs. Katz on this subject (S.M. 380-385). Willis G. Gooding was peremptorily challenged by the People after short perfunctory questioning (S.M. 386). Robert Wilde was challenged for cause by the People when he expressed a conscientious scruple about applying the felony murder law to a defendant who did not do the killing (S.M. 387-390). William R. Gottschalk was peremptorily challenged by the defense (S.M. 390-397). Peter A. Solen was challenged for cause by the People on the ground that he had a conscientious scruple against applying the felony murder law death sentence to a defendant who did not do the killing; the questioning of Solen, by the prosecutor and the Court was very persistent, even though he said that he would follow the law if that

was his duty (S.M. 397-404). Charles F. Callahan was peremptorily challenged by the defense (S.M. 404). Henry Gross after being asked by the Court about his scruples in regard to the felony murder law death sentence problem, the questioning being in a form pretty plainly calculated to arouse almost anyone's scrupulous concern, was peremptorily challenged by the People even though he said his conscience would not prevent him from applying the law. The defense particularly objected to the way in which the Court questioned Mr. Gross on the ground that the questioning appeared to be designed to elicit cause. See S.M. 404-409. Albert J. Okas was peremptorily challenged by the defense (S.M. 409-416). Joseph B. Kaufman was peremptorily challenged by the People even though he was willing to apply the felony murder law (S.M. 417-427). Herbert O. Siermann was peremptorily challenged by the defense (S.M. 429). Charles W. Hubener was peremptorily challenged by the defense (S.M. 430-438). Edward Miller was peremptorily challenged by the defense (S.M. 438-442). Edwin J. Meiners was challenged for cause by the defense on the ground of a possibly prejudiced attitude, the challenge was overruled, and the defense challenged him peremptorily (S.M. 442-454). George F. Libity was excused by the Court when he said he placed special credence in police witnesses (S.M. 454-465). Irwin Belsky was challenged for cause by the People when he expressed reservations about the felony murder law after the type of questioning that was now becoming familiar in this voir dire (S.M. 466-469). David Baclini was challenged for cause by the defense on the ground that he had formed an opinion (S.M. 470-478). John N. Styffe was challenged for cause by the defense on the ground that he had an adverse opin-

ion, the challenge was overruled, and the defense challenged him peremptorily (S.M. 478-484). Joseph J. Sicignano was challenged for cause by the People on the ground that he had reservations about the felony murder law, the defense objecting that he had expressed his willingness to follow the law, the Trial Judge having "worked over" this prospective juror, which resulted in evoking some further expression of conscientious hesitation about the felony murder law. The defense objected to the Court's conduct (S.M. 484-495). Joseph P. Redmond was accepted for the Jury (S.M. 495-500). Anthony R. Caldararo was peremptorily challenged by the People even though he was willing to uphold the felony murder law, the prosecutor in this instance showing a really extraordinary persistence in trying to break down the prospective juror, the defense objecting vigorously to this conduct (S.M. 500-506). Jerome Pleech was peremptorily challenged by the People even though he was sure he was willing to uphold the felony murder law (S.M. 506-510). William K. Ryan was accepted for the jury, the prosecutor's questioning being short and perfunctory (S.M. 510-518). John J. McKullen was challenged for cause by the defense when he expressed special credence of police witnesses (S.M. 518-520). Edwin T. Howe was challenged for cause by the defense as evincing a prejudiced attitude, the challenge was overruled, and the defense was obliged to use a peremptory challenge (S.M. 520-526). Louis Lombardi was peremptorily challenged by the People even though he was willing to uphold the felony murder law (S.M. 526-530). William T. VonGlahn was accepted for the Jury; the prosecutor did not even ask him about the felony murder law (S.M. 530-537). Winifred K. Herrmann was peremptorily challenged by the People even

though she was willing to uphold the felony murder law, the defense objecting to the excessively persistent questioning by the prosecutor on this subject (S.M. 537-543). Alfred Eyer was accepted for the Jury without being questioned by the prosecutor on the felony murder law (S.M. 552-560). Walter E. Halloran was peremptorily challenged by the defense (S.M. 560-564). William V. Raccioppi was peremptorily challenged by the People; he had expressed some hesitation about the felony murder law, but after a lengthy colloquy with the Court he had said he would uphold the law (S.M. 564-574). William E. Herron, Jr. was peremptorily challenged by the defense (S.M. 574-580). Benjamin E. Gewertz was peremptorily challenged by the People. The stenographic minutes of the voir dire of this prospective juror show in an especially striking way the unfolding pattern of the prosecution, aided by the Court, to keep off this Jury persons of Jewish and Italian birth through the device of excessive questioning about the felony murder law. The defense vigorously excepted and moved for a mistrial on these grounds (S.M. 580-590). Heino A. Pohjola was peremptorily challenged by the defense (S.M. 590-596). Richard Chezar was challenged for cause by the People on the ground of conscientious scruples (S.M. 596-602). Walter L. Larkin, Jr. was challenged for cause by the defense on the ground of friendship with police officers (S.M. 602-606). Estelle Sauter was accepted for the Jury; she was willing to uphold the felony murder law (S.M. 606-617). Edward S. Kilanowski was excused by the Court when he said that he had an opinion about the case (S.M. 618-620). Rudolph Coriaty was challenged for cause by the People, over defense objection, and after another of those grilling interrogations

about the felony murder law (S.M. 620-637). Thomas V. Fitzgerald was excused because of friendship connections with the Police Department (S.M. 637-640). Fred B. Young was peremptorily challenged by the People even though he was willing to uphold the felony murder law (S.M. 641-647). Alfred E. Berry was challenged for cause by the People when he expressed hesitations about capital punishment (S.M. 647-656). Charles E. Nelson was peremptorily challenged by the defense (S.M. 656-672). William M. Van Velson was peremptorily challenged by the defense (S.M. 676-683). Howard K. Earle was challenged for cause by the defense on the ground that he would tend to doubt the credibility of witnesses with an unfavorable background (S.M. 684-707). Helen R. Lynch was challenged for cause by the People when she betrayed doubt and confusion about applying the felony murder law (S.M. 707-715). Theodore Schumach was challenged for cause by the People when he said he would have reservations about applying the felony murder law; defense counsel objected, saying "I would like to point out the insidiousness of this special voir dire. These questions have never been given to any of the Jurors who were sworn in again, and I venture to say that if it were given to the men who were sworn in, they would answer the way the men did who were rejected" (S.M. 717; and see S.M. 715-717). Casimir Cogujsza, Jr. was challenged for cause by the People after he finally expressed a hesitation about the felony murder law following persistent questioning by the District Attorney (S.M. 718-725). Arthur H. Friese was accepted for the Jury; he was willing to apply the felony murder law "without reservation" (S.M. 725-734). Frank W. Boehm was peremptorily challenged by the defense (S.M. 734-

742). William H. Ehrlich was challenged for cause by the People on the ground of his hesitation about applying the felony murder law after another of those interrogations to which the defense had been objecting (S.M. 743-746). John R. Winters was challenged for cause by the People after another such questioning which, we contend, was so plainly designed to weed out persons who might favor a recommendation of mercy in a felony murder case (S.M. 746-751). Charles H. Clarke was challenged for cause by the defense on the ground that he doubted the innocence of the defendants (S.M. 751-759).

Following the above, a new panel of jurors was brought in (S.M. 759). The Court preliminarily weeded out, as previously, all persons who said they had a conscientious scruple about the death penalty (S.M. 776-778). The voir dire examination of talesmen was then resumed.

Richard G. Sylva was accepted for the jury; he was willing to apply the felony murder law (S.M. 803-815). Robert P. Grogan was challenged for cause by the People when he expressed reservations about the felony murder law after another of those questionings of the type above mentioned (S.M. 815-819). Harry Charnicoff was peremptorily challenged by the People even though he said he was willing to apply the felony murder law (S.M. 820-823). Edward J. Stevenson was peremptorily challenged by the defense (S.M. 823-828). James R. Everett was accepted for the Jury; he was willing to apply the felony murder law (S.M. 828-837). Thomas C. Strong was peremptorily challenged by the People (S.M. 840-844). Madison M. Roberts was peremptorily challenged by the defense (S.M. 844-849). John E. Robinson was accepted for the Jury, being the

twelfth juror; he was willing to apply the felony murder law (S.M. 849-855). Myron J. Starr was peremptorily challenged by the People even though he had no "question" about applying the felony murder law (S.M. 857-864). John E. Towner was peremptorily challenged by the defense (S.M. 864-866). Michael F. Coffey was peremptorily challenged by the defense (S.M. 866-871). Frank X. Ricca was challenged for cause by the People when, after the now familiar pattern of questioning, he expressed reservations about the felony murder law (S.M. 871-875). Lawrence T. Raymond was accepted as an alternate juror; he was willing to apply the felony murder law (S.M. 876-883). Eugene P. Young was accepted as an alternate juror; he was willing to apply the felony murder law (S.M. 883-888). George Weinstein was peremptorily challenged by the People even though he was willing to apply the felony murder law (S.M. 888-890). Salvatore P. Timpanelli was peremptorily challenged by the People; he was not even asked by the People whether he was willing to uphold the felony murder law (S.M. 890-893). John H. McDonald was peremptorily challenged by the defense (S.M. 893). Charles Peles was challenged for cause by the People when, after another of those questionings, he expressed reservations about the felony murder law (S.M. 893-897). Peter Gistaro was peremptorily challenged by the People even though he said he would uphold the felony murder law, "No question in my mind" (S.M. 898-907). George E. Gannon was peremptorily challenged by the defense (S.M. 907-911). Bertram F. Cash was peremptorily challenged by the defense (S.M. 911-914). James P. Mone was accepted as the third alternate juror (S.M. 914-916).

We submit that the *voir dire* above described violates the Fourteenth Amendment guarantee to a defendant of a fair and an impartial jury. Cf. *Irvin* v. *Dowd,* 366 U.S. 717; *Brown* v. *Allen,* 344 U.S. 443, cert. den. (*Spiller* v. *Allen*) 345 U.S. 946.

CONCLUSION

Petitioner Jerome Rosenberg respectfully adopts, insofar as applicable to his case, the questions presented and the points urged in support of the granting of certiorari in the companion petition of Portelli.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Jerome Rosenberg

APPENDIX A

Opinion of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ANTHONY PORTELLI and JEROME ROSENBERG, Appellants.
Decided March 11, 1965.

Per Curiam. The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and, since we find no errors of law, we would have no occasion to write were it not for the testimony of police brutality which the record before us contains.

On May 18, 1962 two police officers, Detectives Luke Fallon and John Finnegan, were shot and killed in Brooklyn during the course of a holdup when they sought to apprehend the robbers. Upon the trial, held in January of 1963, one of the principal witnesses against the defendant Portelli was a small-time criminal by the name of Richard Melville. Called by the People, he testified that the defendant Portelli came to his home (with two other men) on May 20 and completely implicated himself in the homicides, describing how he participated in the robbery, how he shot the police officers and how he managed to get away. On cross-examination, Melville stated that later the same day several detectives took him to a police station for questioning and that, although he first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner.

However, he insisted from the witness stand that the pretrial statement which he made to the police, as well as his testimony, implicating Portelli was completely true.

It is the defendant's contention that the witness' testimony shoud have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury. (See 3 Wigmore, Evidence [3d ed., 1940], § 815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.

In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct.

Appendix A—Opinion of the Court of Appeals of the State of New York

The judgments of conviction should be affirmed.

Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Judgments of conviction affirmed.

APPENDIX B

Judgment of the Court of Appeals of the State of New York—Amended Remittitur

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR March 11, 1965.

Filed Mar 26 1965

Sup. Ct. No. 459

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Appendix B—Judgment of the Court of Appeals of the State of New York—Amended Remittitur

BE IT REMEMBERED, That on the 26th day of December in the year of our Lord one thousand nine hundred and sixty-three, Anthony Portelli and Jerome Rosenberg, the appellants in this action, came here unto the Court of Appeals, by Evseroff, Newman and Sonenshine and Albert C. Aronne, and Maurice Edelbaum, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of conviction of the Supreme Court, Kings County. And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellant Portelli, and by Mr. Maurice Edelbaum, of counsel for the appellant Rosenberg, and by Mr. Aaron Nussbaum, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of conviction of the Supreme Court, Kings County, appealed from in this action, be and are hereby in all things AFFIRMED. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness

Richard Melville [see 15 N Y 2d 235] and (2) by other errors in the conduct and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Supreme Court.

Therefore, it is considered that the said original judgments of conviction be and are hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, Kings County, before the Justices thereof, according to the form of the statute in such case made and provided.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, March 11, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

Raymond J. Cannon
Clerk

APPENDIX C

Order Amending Remittitur of the Court of Appeals of the State of New York

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of April 1965.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 399

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Motions to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted, the return of the remittitur requested and,

Appendix C—Order Amending Remittitur of the Court of Appeals of the State of New York

when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness Richard Melville [see 15 NY 2d 235] and (2) by other errors in the conduct of and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball
Deputy Clerk

APPENDIX D

Minutes of Sentence and Order of Execution

Minutes of Sentence (Jerome Rosenberg)

At a Criminal Term of the Supreme Court, held in and for the County of Kings, at the Court House, Civic Center, in the Borough of Brooklyn, City of New York, on the 18th day of February 1963.

Present: Hon. Samuel S. Leibowitz
Justice—Supreme Court

Indictment No. 2484/62

The People of the State of New York

—against—

Jerome Rosenberg

Defendant

Indicted for Murder, first degree, two counts, and convicted on January 29, 1963, on each of the two counts, by a verdict of a jury, of the crime of Murder, first degree, while committing a felony, without a recommendation of mercy.

Being personally present the defendant refused to answer all questions pertaining to his pedigree asked of him by the Clerk of the court.

Appendix D—Minutes of Sentence and Order of Execution

Minutes of Sentence (Jerome Rosenberg)

The defendant and his counsels being present and the defendant being asked if he had any legal cause to show why the judgment of the law should not be pronounced against him, and he having no legal cause, the Court pronounced judgment as follows:

WHEREUPON, it is ORDERED and ADJUDGED by the Court, that the said JEROME ROSENBERG, for the Murder in the first degree, while committing a felony, without a recommendation of mercy, of John Finnegan, whereof he is convicted, be and hereby is sentenced to the punishment of death, and that within ten days from this date the Department of Correction of the City of New York deliver the said JEROME ROSENBERG, together with the warrant of this Court, to the Agent and Warden of the Sing Sing State Prison at Ossining, New York, where he shall be kept in solitary confinement until the week beginning the 31st day of March, 1963, and that upon some day within the week so appointed, the Agent and Warden of the said Sing Sing State Prison at Ossining, New York, shall do execution upon him, the said JEROME ROSENBERG, in the mode and manner prescribed by law.

A TRUE EXTRACT FROM THE MINUTES

JAMES A. KELLY
Deputy and Acting Clerk
of Kings County

Order of Execution (Jerome Rosenberg)

Indictment No. 2484/60

THE PEOPLE OF THE STATE OF NEW YORK

—against—

JEROME ROSENBERG

Defendant

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

To the Agent and Warden of Sing Sing State Prison at Ossining, N. Y.

WHEREAS, at a Criminal Term of the Supreme Court held in and for the County of Kings on the 14th, 15th, 16th, 17th, 18th, 21st, 22nd, 23rd, 24th, 25th, 28th and 29th day of January 1963, the above named defendant, JEROME ROSENBERG, was put upon his trial for Murder in the first degree, of Luke Fallon and John Finnegan, committed in the County of Kings, on May 18, 1962, and upon said trial the said JEROME ROSENBERG having been found guilty by the verdict of a jury of Murder in the first degree, while committing a felony, without a recommendation of mercy, of Luke Fallon and John Finnegan, on January 29, 1963 and on February 18th, 1963 having been sentenced to be put to death for each of the said killings in the manner provided by law on some day in the week beginning the 31st day of March, 1963:

Appendix D—Minutes of Sentence and Order of Execution
Order of Execution (Jerome Rosenberg)

Now it is hereby ORDERED that the execution of the said sentence so imposed upon the said JEROME ROSENBERG, for the murder of the said John Finnegan, be done upon the said JEROME ROSENBERG by you, the said Warden of Sing Sing State Prison, at Ossining, N. Y., in the manner prescribed by law within the walls of the said prison or inclosure thereto adjoining, on some day in the week beginning the 31st day of March, 1963.

WITNESS, my hand at the Borough of Brooklyn, City of New York, County of Kings aforesaid on the 18th day of February, 1963.

SAMUEL S. LEIBOWITZ
Justice—Supreme Court

Given under my hand and attested
by the SEAL of the said Court on this
18th day of February, 1963

JAMES A. KELLY
Deputy and Acting Clerk
—Kings County

APPENDIX E

Statutes Involved

N.Y. Penal Law §1044

"§1044. Murder in first degree defined

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed."

* * * * *

"2. * * * without a design to effect death, by a person engaged in the commission of or in an attempt to commit a felony, either upon or affecting the person killed or otherwise; * * *"

N.Y. Penal Law §1045-a

[As it was in force at the time of the sentencing in this case.]

"§1045-a. Life imprisonment for felony murder; jury may recommend

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life. Added L. 1937, c. 67, §2, eff. March 17, 1937."

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IN THE

Supreme Court of the United States

October Term, 1964

No. 269

ANTHONY PORTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney
Kings County
Attorney for Respondents

AARON NUSSBAUM,
Assistant District Attorney,
of Counsel.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1964

No. 269

ANTHONY PORTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, unanimously affirming the judgment of the Supreme Court of the State of New York, County of Kings, convicting him of the crime of Murder in the First Degree.

Petitioner had been convicted by verdict of the Jury of the crime of felony murder, without a recommendation for life imprisonment under the New York Penal Law, Section 1045-a.

The opinion of the Court of Appeals of the State of New York is reported in 15 N.Y. 2d 235.

The judgment and warrant of death against petitioner had been duly stayed on April 19, 1965, by the Chief Judge of the Court of Appeals of the State of New York, pending the hearing and determination of this petition for certiorari.

On April 22nd, 1965, the Court of Appeals of the State of New York duly amended its judgment to provide that no constitutional rights of the petitioner had been violated under the Fourteenth Amendment of the Constitution of the United States.

Summary of the Facts

The petitioner, Anthony Portelli, and his co-petitioner, Jerome Rosenberg were convicted of felony murder without a recommendation for mercy, and sentenced to death on February 18, 1963, after a trial by Jury before Honorable Samuel S. Leibowitz, a Justice of the Supreme Court of the State of New York, County of Kings (171, 183).*

The indictment charged the petitioners, Portelli and Rosenberg, acting in concert with one Anthony Dellernia,** with Murder in the First Degree in the killing of two detectives, Luke Fallon (First Count), and John Finnegan (Second Count), during the commission of a robbery of a tobacco shop on May 18, 1962. Each of the petitioners was armed with a loaded gun. The slain detectives had been on taxicab patrol duty with the 78th Police Squad at the time of the homicide.

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* Numerals refer to folio numbers in printed record on appeal.

** A mistrial was declared as to the co-defendant, Dellernia (3563-4). He was retried subsequent to the conviction of the petitioners and was acquitted.

Guilt of each of the co-petitioners, Portelli and Rosenberg, had been established beyond a reasonable doubt. Both of them were doubly identified by David Goldberg and Robert Goldberg, the proprietors of the tobacco shop, as the perpetrators of the killing during the course of the robbery.

In addition, the co-petitioner Rosenberg was identified by a witness who confronted him face to face as he ran towards her from the tobacco shop immediately after the commission of the crime (1139-40).

Apart from the direct evidence of the identification, the invincible circumstantial evidence adduced against them was such as to exclude to a moral certainty every other reasonable hypothesis than that of their guilt (*People* v. *Razezicz,* 206 N.Y. 249; *People* v. *Harris,* 306 N.Y. 345; *People* v. *Eckert,* 2 N.Y. 2d 126). Thus, as to the petitioner Portelli:

• The fingerprints found on a check (People's Exhibit 25) picked up between the cash register and the cigar humidor at about 4:30 P.M. on May 18, 1962 was found to be "identical" with Portelli's fingerprints (1400-1406).

Detective Arthur Mandella, the Fingerprint Expert for the Police Department Bureau of Criminal Identification, unequivocally testified that: "I have never in my whole life seen so many characteristics in the same location, with no differences" (1429, 1490-1).

• Portelli's own fingerprint expert, Buck Grene, with a background as Chief of Criminal Identification for the Treasury Department Enforcement Agencies from 1928 to 1952, himself stated that the inked prints and the check

fingerprint "positively" came from the same person and that there was no difference in characteristics between the two (3322-6, 3333-4).

• A second fingerprint expert for the People, Sebastian Francis Latona, Chief of the Latent Fingerprint Section of the F.B.I. testified that the fingerprint on the check and the inked fingerprint "were both made by one finger and that no other finger could make these impressions." He had found a total of 17 points of similarity between them (3687-9).

• Portelli gave a detailed statement of the crime to Richard Melville in the latter's home on Saturday, May 19, 1962 shortly after midnight (1559-63, 1608-9).

• There, harbored by Melville, the petitioner then proceeded to dye his hair black with a dye comb (1591-3). Melville's testimony was corroborated by his wife who stated that she had purchased the black dye comb at a drugstore and brought it home and that Richard dyed Portelli's hair with it (2464-70).

• Melville further testified that Portelli made his getaway to the Lido Motel in Chicago, under the alias of "Jim Davis"; that Portelli had been given a slip of paper containing a notation of his destination, the name "Jim Davis", as well as the name and address and telephone number of Richard Melville (People's Exhibits 56A and 56B).

Corroborating Melville's testimony, the People established that when Portelli was arrested at the Lido Motel in Chicago on May 21st, 1962, the detective ascertained

that he had in fact registered under the fictitious name of "Jim Davis".

• Found in Portelli's motel room at the time was an airline ticket (Peo. Ex. 93) which had been sold by an agent to "J. Davis" at Newark Airport on May 21st, 1962 for 8:15 A.M. Friday flight to Chicago (3375-9).

• As the police officer entered the room, he saw Portelli tearing a paper in two, being People's Exhibit 56A and 56B (3111-14).

This proof of flight, as well as the attempted spoliation of evidence, was clearly indicative of a consciousness of guilt (*People* v. *Deitsch*, 237 N.Y. 300; *People* v. *Reddy*, 261 N.Y. 479).

• Among other items of cogent circumstantial evidence adduced by the People against Portelli, it was established that the clothing worn by him at the time of the robbery, as described by the two Goldberg brothers and various witnesses at the scene, substantially matched the description of his attire given by the witness, Linda Manzione, who had seen Portelli wear a white T-shirt while en route to the robbery in Dellernia's car (2677-9).

• Portelli's sunglasses (People's Exhibit 42) and his hat (People's Exhibit 7), found on the floor of the tobacco shop immediately after the homicide (1191-1207), were identified by Linda Manzione as the articles similar to those worn by him at the time.

• Further, she observed that when Portelli and Rosenberg stepped out of Dellernia's car on 78th Street and New

Utrecht Avenue, the two put their hats and sunglasses on (People's Exhibits 7, 26, 42) (2682-7, 2742), and that Portelli carried a little brown paper bag (2689).

• The ballistics evidence conclusively established that the two bullets extracted from the bodies of the deceased detectives were fired from the .38 special positive revolver (People's Exhibit 5), which was found on the floor of the tobacco shop shortly after the homicide (1892-3, 1827-30).

• In this connection, Portelli's own confession to Melville confirmed the fact that he had dropped the gun in the tobacco shop during the course of the robbery (1608-9).

Neither the petitioner, nor the co-defendant Rosenberg, took the stand in their own defense.

The judgment of conviction had been unanimously affirmed by the New York Court of Appeals under its plenary right and power to review issues of law and fact in a capital case "whether any exceptions shall have been taken or not in the Court below", as mandated by *New York Const. Art. 6 Sec. 7* and *New York Code Crim. Pro. Secs. 517 and 528* (*People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Nelson,* 189 N.Y. 137, 81 N.E. 768; *People* v. *Creasy,* 236 N.Y. 205, 140 N.E. 563; *People* v. *Crum,* 272 N.Y. 348, 6 N.E. 2d 51; *People* v. *Peller,* 291 N.Y. 438, 52 N.E. 2d 949; *People* v. *Leyra,* 302 N.Y. 353, 98 N.E. 2d 553).

POINT ONE

The due process requirements of full and fair disclosure of all the facts surrounding the testimony of the witness Melville were fully satisfied.

I

The New York Court of Appeals held at bar:

> *"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence (3d ed., 1940), Sec. 815, pp. 230-231). *The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.*
>
> *In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melforum is available for these charges of misconduct."*
> *ville testified and we simply note that an appropriate forum is available for these charges of misconduct."*

The due process test applicable to the testimony of a witness is that of full and fair disclosure of all the facts affecting his credibility. (*Mooney* v. *Holahan,* 294 U.S. 103, 112; *Pyle* v. *Kansas,* 317 U.S. 213; *Napue* v. *Illinois,* 360 U.S. 264; *Brady* v. *State of Maryland,* 373 U.S. 83; *United States ex rel. Meers* v. *Wilkins,* 2nd Cir. 326 F. 2d 275, 282; *People* v. *Savvides,* 1 N.Y. 2d 554; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Mangi,* 10 N.Y. 2d 86; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Fazio,* 14 N.Y. 2d 716.

After testifying that he had been beaten by the police before disclosing to them that Portelli had made a detailed confession of the crime to him, Melville unequivocally told the jury at the trial that his testimony was the absolute truth, as was the testimony that he had given to the Grand Jury (1759-60).

Likewise, Fernanda Melville, his wife, affirmed the truthfulness of her testimony before this jury, notwithstanding her statement that she had previously been in fear regarding their involvement in this case (2482-90).

The District Attorney, in his summation, told the jury:

> "We come to Richard Melville and to Richard Melville's wife Fernanda. He testified that when he was in the precinct on Sunday night at about 10:30, he was beaten; he was kicked; he was assaulted with cigarette butts held by the police and put to the back—to his back; that he was in such pain and in such suffering—I don't condone those actions. I don't condone them on the part of the police or anyone else, and particularly, the police. It is an absolute outrage in these times where people have to be subjected to that practice and to that conduct, to

> go through that pain and suffering by these police. Notwithstanding their enthusiasm, notwithstanding their eagerness to get the proper defendant, they had no business to do that which was described by Melville, and it shall not rest here either. But yet, during the two and a half hours of these pains and these sufferings through which this man experienced, he said he didn't know Portelli. He said he didn't know Rosenberg, and he said he didn't know Dellernia.
>
> But the fact of the matter is that he knew Portelli and for two and a half hours he denied that he knew him. So when he admitted under this pain and this assault by the cops upon him, he admitted that he knew Portelli, and the fact remains that defense counsel, in putting this woman on the stand, Mrs. Frankolino, she admits that she knew Portelli, and that her brother Frank Lino was a friend of Portelli'' (3921-4).

And the Court, training the searchlight of truth on the credibility of the witness, forthrightly charged the jury as follows:

> ''Now the question is, did he confess to Melville? What about Melville? Who is Melville? What is his background? He is an ex-convict. He is a bookmaker living outside of the pale of the law. He is a no good loafer. I wouldn't trust him further than I could 'throw a stick,' based on his background. Now I can't be any more forthright than that, can I? I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the

case which backed him up, evidence that I believed beyond a reasonable doubt'' (4145-6).

* * * and further, at fols. 4149-54:

''Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him an unmerciful beating, which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'given the works,' as they say by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.

What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station house, deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the man-

ner that Mr. Selzer did, and in the manner that the other attorneys did too. But what about his testimony? Is his testimony to be ruled out, to be disregarded just because the cops gave him a beating, and for no other reason?

The answer to that question is no. It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.

I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Thus, unlike the cases dealing with coerced confessions of an accused, all bearing the imprint of an "inherent untrustworthiness" (*Spano* v. *New York,* 360 U.S. 315, 320-321) and "probable unreliability" (*Jackson* v. *Denno,* 12 L. ed. 2d 908, 921), Melville's testimony was vested with the imprimatur of credibility under the careful and circumspect instructions of the trial court.

What is decisive as to the due process claim by petitioner is that the witness' testimony as such in no way violated petitioner's right against self-incrimination, for his con-

fession to the witness was indisputably voluntary and uncoerced.

Hence, this is not a case where the State "wrings a confession out of an accused against his will" (*Blackburn* v. *Alabama,* 361 U.S. 199); or deigns to "prove a charge against an accused out of his own mouth" (*Malloy* v. *Hogan,* 377 U.S. 1, 12 L. ed. 2d 653, 659); or infringes in the slightest degree on the irretractable principle of criminal justice that " the rack and torture chamber may not be substituted for the witness stand." (*Brown* v. *Mississippi,* 297 U.S. 278.)

The underlying fallacy of petitioner's argument is that it is hoisted on the entirely erratic premise that Melville's testimony was "coerced testimony" (Pet. Br. p. 6), which it decidedly was not. Quite to the contrary, Melville's *testimony* was wholly voluntary on the witness stand.

It was testimony given under the aegis and protection of the trial Court, with every sanction of cathartic cross-examination available to the petitioner.

Thus, unlike the vicarious impact of admissions resulting from a coerced confession wrung from an accused, this was the uncoerced and direct testimony of a witness given under entirely wholesome credentials of reliability.

In the words of this Court, in *Maddox* v. *United States,* 156 U.S. 237, 242-3, it was testimony which fully satisfied every standard of a fair trial, including:

> " * * * *a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they*

> *may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"

This Court's recent decision in *Malloy* v. *Hogan*, 377 U.S. 1, 12 L. ed. 2d 653, is dispositive of the constitutional issue. In *Malloy*, this Court enunciated the new basic constitutional doctrine that the admissibility of a coerced confession in a State criminal prosecution shall be tested not by the due process clause, or "whether the conduct of State officers in obtaining the confession was shocking", but rather, by the standard of the Fifth Amendment's command against self-incrimination.

If, then, as to an *accused*, "the constitutional inquiry is not whether the conduct of state officers in obtaining a confession is shocking, but whether the confession is free and voluntary * * * —in other words, the person must not have been compelled to incriminate himself"—then it logically follows that testimony of *a person other than an accused individual* cannot be constitutionally objected to on that ground, because no right against self-incrimination has been violated.

Accordingly, applied to Melville's testimony, the constitutional inquiry is not as to whether the conduct of the police in obtaining the evidence was "shocking", but solely whether the witness' testimony was given freely and voluntarily, with all-out disclosure to the jury of all the relevant facts, so as to assure to petitioner an absolute fair trial under procedural due process of law.

Rochin v. *California*, 342 U.S. 165, patently enough, is plainly inapposite. There, the victim of the constitutional

deprivation of due process was the *accused* on trial, and not a witness as here.

There, unlike here, the forcible extraction of incriminating evidence from the stomach of the accused—which the Court properly denounced as "conduct that shocks the conscience"—directly violated the constitutional right *of the accused* against compulsory self-incrimination (*See concurring opinion of Mr. Justices Black and Douglas; Malloy* v. *Hogan, supra*).

Thus, within its own consensus, the reach of *Rochin* cannot constitutionally apply to the situation at bar.

II

In any view of this case, petitioner is utterly without legal standing to urge upon this Court that the insidious tactics practiced by the police against the witness rendered his testimony constitutionally inadmissible.

Directly analogous here is the constitutional proscription against unreasonable searches and seizures, available only as to one "who has standing to complain" (*Jones* v. *United States,* 362 U.S. 257; *Ker* v. *California,* 374 U.S. 23).

The right to due process of law is one personal to the accused. "The rule (*Rochin* v. *California, supra*), does not apply unless the person upon whom the atrocity was committed is the defendant on trial" (*8 Wigmore Evidence, sec. 2184a, p. 50, McNaughton Rev. 1961*).

Comporting with our position herein, petitioners made no objection to the admissibility of Melville's testimony, nor did they take exception to the Court's instructions thereon.

III

There is a complete absence of any authority for the proposition urged upon this Court that coercion practiced upon a witness should be equated to the rule governing the admissibility of out-of-court confessions extracted from an accused.

As a practical matter, there is no logical basis for such equation in view of the fundamental differences inhering between the two types of testimony, as already aforenoted.

Again, petitioner's argumentative projection at bar, if ever adopted, could not but lead to results gravely inimical to the public interest and to the sound administration of criminal justice.

The great climactic quest for truth in the judicial process would be seriously compromised in the chaotic shuffle of endless *voir dire* examinations pervading criminal trials.

Consistent with the rote common to coerced confessions generally, the range of inquiry would likewise have to embrace all patterns of coercion: physical violence as well as the "more sophisticated modes of persuasion" (*Blackburn* v. *Alabama,* 361 U.S. 199; *Rogers* v. *Richmond,* 365 U.S. 534; *Hysler* v. *Florida,* 315 U.S. 411, 413).

The broad judicial inquiry would perforce have to apply to sundry testimony from witnesses of diverse nature, whether testifying to a confession as here, or to such other material issues as a disputed identification, or the corroboration of an accomplice, or to matters in rebuttal for the prosecution, among all others.

Typically illustrative of the intolerable stresses to which the judicial process would thus be subjected would be the very case at bar, where practically every one of the People's major witnesses (Louis Ferrara, Linda Manzione, Fernanda Melville, Richard Melville, David Goldberg, Robert Goldberg) would have had to run the gauntlet of *voir dire* examination as to the "competency" of their testimony by advance ruling of the trial court, as had been urged by the petitioner in the Court below.

The demands of due process should not be so stretched as to impose intolerable standards on the fair conduct of a criminal trial, or to fasten "fetters of unreason upon the States" (Mr. Justice Frankfurter, in concurring opinion, *Adamson* v. *Calif.*, 332 U.S. 46).

> *"The problem is that of achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other."*
>
> *People* v. *Waterman*, 9 N.Y. 2d 561.

In *Columbe* v. *Connecticut*, 367 U.S. 568 at p. 588, the Court stated:

> *"Due process does not demand of the states, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt."*

In *Rochin*, this Court laid down the guiding principle, at p. 168:

> *"Due process of law * * * is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice".*

And at p. 172:

> *"Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355, 52 L. ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, *on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society".*

POINT TWO

The taking of Portelli's fingerprints violated no constitutional rights of this petitioner.

I

The taking of Portelli's fingerprints deprived him of no right against self-incrimination, for the Fifth Amendment is essentially aimed against testimonial compulsion only.

The petitioner's position at bar leads absurdly to the ineluctable corollary that even routine fingerprinting, photographing or blood grouping tests of an accused for the purpose of police booking following an arrest (*Section 940, Code of Criminal Procedure*), and the use of identification evidence obtained thereby, would be violative of the right against self-incrimination.

Equally absurd would be the sister corollary that no victim of a crime may ever view the accused for the purpose of an identification at a police lineup, or even in a courtroom, without running afoul of the prisoner's constitutional rights.

In *Holt* v. *United States*, 218 U.S. 245, it was argued that the Fifth Amendment forbade the testimony of a witness that a blouse claimed to belong to the accused had been put upon the prisoner and that it fitted him.

Speaking for a unanimous Court, Mr. Justice Holmes labeled such an argument "an extravagant extension of the Fifth Amendment." Said the Court at pp. 252-3:

> *"Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams* v. *New York*, 192 U.S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372."

The petitioner's position at bar, we respectfully submit, is an equally extravagant extension of the Fifth and Sixth Amendments alike.

Pointing up the essentiality of "testimonial compulsion" as a prerequisite to the self-incrimination privilege, *Wigmore* states as follows:

> "If an accused person were to refuse to be removed from the jail to the courtroom for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.
>
> The limit of the privilege should be plain. From the general principle, it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness—i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily action were synonymous with testimonial utterance; *for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion.* What is obtained from the accused by such action is not testimony about his body, but his body itself. *Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a*

testimonial one. Moreover, a practical consideration applies to this class of evidence. When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor.

Hence, the public interest in obtaining the evidence is usually sufficient to outweigh by a clear margin the private interests sacrificed in the process.

Both principle and practical good sense forbid any larger interpretation of the privilege in this application." (Italics ours.)

8 Wigmore, Evidence, Section 2265, p. 386 (*McNaughton Rev.* 1961).

In *United States* v. *Kelly* (C.A. 2d) 55 F. 2d 67, the Court held that fingerprints of one charged with an unlawful sale of liquor may lawfully be taken by federal officers at the time of the arrest.

In *United States* v. *Nesmith,* 121 F. Supp. 758, District Judge Holtzoff, citing a long line of precedents, held:

"The law is clear, therefore, that the privilege against self-incrimination is limited to the giving of oral testimony. It does not extend to the use of the defendant's body as physical or real evidence."

In *Shaffer* v. *United States,* 24 App. D.C. 417, 426, the Court of Appeals for the District of Columbia in an opinion written by Chief Justice Alvey, wrote as follows:

"This objection is founded upon the theory that the use of the photograph so obtained is in violation of the priciple that a party cannot be required to testify against himself, or to furnish evidence to be so used. But we think there is no foundation for this

> *objection. In taking and using the photographic picture there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture.* We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark, in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification."

In *East* v. *State*, 1955, 197 Tenn. 644, 277 S.W. 2d 361, the taking of fingerprints was specifically held to be beyond the pale of the privilege against self-incrimination by testimonial compulsion. To the same effect, is *United States* v. *Iacullo*, C.A. Ill. 1955, 226 F. 2d 788; *State* v. *Lei*, Wash. 1961, 365 P. 2d 609.

We note finally the dissent of Mr. Justices White, Clark and Stewart in *Escobedo* v. *Illinois*, 378 U.S. 478.

> "It is incongruous to assume that the provision for counsel in the Sixth Amendment was meant to amend or supersede the self-incrimination provision of the Fifth Amendment, which is now applicable to the States. Malloy v. Hogan, 378 U.S. 1, 12 L. ed. 2d 653, 84 S. Ct. *That amendment addresses itself to the very issue of incriminating admissions of an accused*

> ***and resolves it by proscribing only compelled statements.*** Neither the Framers, the constitutional language, a century of decisions of this Court nor Professor Wigmore provide an iota of support for the idea that an accused has an absolute constitutional right not to answer even in the absence of compulsion—the constitutional right not to incriminate himself by making voluntary disclosures." (Italics ours)

Bynum v. *United States*, 262 F. 2d 465, cited by petitioner (Br. 19-21), is clearly distinguishable. There, the holding was that the fingerprinting of an accused, taken during an illegal arrest, was violative of the defendant's rights against a constitutionally proscribed seizure or arrest under the Fourth Amendment.

Here, the legality of the arrest is not in question.

II

Portelli's constitutional rights to counsel were in no way violated:

1. The fingerprinting took place before any judicial proceedings had been commenced against him, either by way of arraignment or indictment in any Court.

2. The record is devoid of any showing of deprivation of the right to counsel under the Sixth Amendment, in that there was no request for, or refusal of, counsel at any time.

3. In the circumstances at bar, the taking of Portelli's fingerprints, in the absence of counsel, and without warning of his right against self-incrimination, was not in violation of petitioner's due process rights under the Fourth and Fourteenth Amendments.

It is the general rule that the right to counsel becomes operative only with the formalization of judicial proceedings against the accused (*People* v. *DiBlasi*, 7 N.Y. 2d 544; *People* v. *Waterman*, 9 N.Y. 2d 561; *People* v. *Meyer*, 11 N.Y. 2d 162; *People* v. *Rodriguez*, 11 N.Y. 2d 279; *People* v. *Gallo*, 12 N.Y. 2d 12; *People* v. *Davis*, 13 N.Y. 2d 690; *People* v. *Robinson*, 13 N.Y. 2d 296; *Spano* v. *New York*, 360 U.S. 315; *Massiah* v. *United States*, 377 U.S. 201).

In *Escobedo* v. *Illinois*, 378 U.S. 478, Mr. Justice Stewart in a separate dissenting opinion, noted:

> *"Under our system of criminal justice, the institution of formal, meaningful, judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary litigative proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial."*

Likewise, this case involves no deliberate bypassing of counsel, or refusal to grant the aid of counsel in situations where it is specifically requested by an accused (*People* v. *Spano*, 4 N.Y. 2d 256; *People* v. *Noble*, 9 N.Y. 2d 571; *People* v. *Donovan*, 13 N.Y. 2d 148; *People* v. *Failla*, 14 N.Y. 2d 178, *Escobedo* v. *State of Illinois*, 378 U.S. 478).

Here, in stark contrast, Portelli made no request for counsel following his arrest, nor was there the faintest suggestion of any conduct offensive to the ordered concept of liberty in connection with the taking of the fingerprints which could have triggered any special need for counsel at that time (*People* v. *Gunner*, 15 N.Y. 2d 226; *State* v. *McLeod*, Ohio Supr. Ct. December 29, 1964, 33 USLW 2351;

State of Utah v. *Sullivan*, 227 F. 2d 511, *cert. den. sub nom.*, *Braasch* v. *Utah*, 350 U.S. 973; cf. *Wade* v. *Mayo*, 334 U.S. 672, 684, and *Hamilton* v. *Alabama*, 368 U.S. 52).

In short, there is no showing to the slightest degree, at bar, of "abdication through unawareness of * * * constitutional rights." (*Escobedo* v. *Illinois, supra*, at p. 490). In essence, the principles enunciated by this Court in *Crooker* v. *Calif.*, 357 U.S. 433 and *Cicenia* v. *Lagay*, 357 U.S. 504, are here directly controlling.

III

In this connection, no objection was taken to the fingerprint evidence of Portelli on the specific grounds predicated on the Fifth and Sixth Amendments now urged before this Court. Accordingly, the point is not now available for appellate review (*On Lee* v. *U.S.*, 343 U.S. 747, footnote 3; *People* v. *Gallo*, 12 N.Y. 2d 12; *People* v. *Kelly*, 12 N.Y. 2d 248; *People* v. *Coffey*, 11 N.Y. 2d 142; *People* v. *O'Neill*, 11 N.Y. 2d 148; *People* v. *Friola*, 11 N.Y. 2d 157).

POINT THREE

The petitioner received a fair and impartial trial by an unbiased jury.

I

The record will show that when the jury had been finally selected, the defense had not exhausted all its peremptory challenges (253).* Further, counsel for Rosenberg, as well as the co-defendant Dellernia, had expressed themselves as satisfied with the jury. Counsel for Portelli stated that

* Numerals refer to Minutes of Proceedings on Selection of Trial Jury.

he had "no challenges either peremptory or otherwise" (252).

This jury had been carefully selected with a view of securing an absolutely fair and impartial trial for the accused. Six of the fifteen jurors and alternates selected had read nothing at all about the case (*Clevenger*, 294-5, 301; *Redmond*, who may have read only headlines on it but had heard nothing about the case 497-8; *Sauter*, 611; *Robinson*, 853-5; *Raymond*, 880-1; *Young*, 887).

Of the remaining jurors selected, one (*Everett*) was not at all asked whether he had seen any publicity regarding the case (828-839); five others stated they had only a vague recollection of it (*McCaa*, 280-2; *Burch*, 353; *Friese*, 729; *Sylva*, 808-810; *Mone*, 915-916). Several of the latter had no recollection of even reading anything at all about the arrest, or knowing anything about the background of these appellants. In all, only one juror stated that he had read something about Rosenberg's "having a record of some sort" (122-3), adding that although he had read about the crime, "he don't remember much about it" (183).

II

Portelli's motion for a change of venue "to the Counties of Onondaga, or Erie, or Oneida" (4489) pursuant to Section 346 of the Code of Criminal Procedure, had been properly denied by the Appellate Division of the Second Judicial Department on January 11, 1963 (18 A.D. 2d 820).

In opposition to that motion, the answering affidavit of the District Attorney set forth as follows:

That the motion for the change of venue was not made until the very eve of trial, after a special jury panel of 250 veniremen had been selected on January 3, 1963, all of whom had been notified to appear for service on January 14, 1963; that though the indictment had been pending since July 25, 1962, no proceeding had been commenced for a change of venue during the entire six month period preceding the date of trial; that, therefore, the motion was wholly lacking in good faith and was conceived only as an afterthought in an attempt to delay the trial.

Further, that it was inexplicable why the change of venue was sought specifically to the Counties of Onondaga, or Erie, or Oneida, particularly inasmuch as the leading newspapers in thos counties likewise carried equivalent newspaper publicity regarding the crime and apprehension of these appellants during the month of May, 1962; therefore, that in view of the statewide newspaper publicity which this case had received, "it is obvious that whatever prejudice may have resulted could best be dissipated by a trial in the great population center of Kings County which would best assure the ultimate selection of an impartial and unbiased jury" (p. 3, Aff. in Opp.).

Further, that the passage of over seven months since the commission of this crime and the arrest had long obscured the incident in the public mind; that the crowding of important news events had all but put the pending homicide prosecution "in the limbo of yesterday's forgotten news" (p. 4, Aff.); that during the interval of time between his apprehension and the date of trial, the press had been filled daily with such overpowering news developments as the grave Cuban missile crisis, the brinkmanship of a threat-

ened nuclear war with Russia, and other international news events converging in the New York City headquarters of the United Nations; that during the same interval, the public mind had also been distracted by the impact of such news events as the catastrophic stock market crash of May 28, 1962, and the Meredith civil rights explosion involving the armed intervention of United States troops.

Further, that a newspaper strike had been in progress in its 34th day preceding the making of the motion for the change of venue, producing "an almost total blackout of news reporting involving this or any other case of newsworthy interest, whereas the press services of the counties to which the petitioner seeks to have this case removed for trial, had retained their normal reporting services throughout" (p. 4, Aff.).

Finally, that the trial was to be by a special jury under Section 749(aa) of the Judiciary Law; that under the statute, no special juror is eligible to serve "who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *"; that two of the three Counties (Oneida and Onondaga) to which removal of the trial had been sought by these appellants, would not have been able to offer to them the protection of a sifted special jury for the reason that the population of these Counties is under one million, the minimum required by statute for the authorization of a special jury; that as to the third County (Erie), a special jury is rarely, if ever, used in any case (Aff. pp. 4-5).

III

On this recital of the facts, it is manifest that the denial of petitioner's motion for a change of venue had been proper in the sound judicial discretion of the Appellate Division below.

The general principle set forth by the United States Supreme Court in *Irvin* v. *Dowd*, 366 U.S. 717, at pp. 722-723, is here directly applicable:

> *"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."*

In *Irvin* v. *Dowd, supra,* this Court held, in an altogether different factual setting, that a conviction was violative of due process where intensive publicity given to the defendant's confession to six murders rendered a fair trial impossible. Said the Court at p. 727:

> *"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. Stroble* v. *California,* 343 U.S. 181, 96 L. ed. 872, 72

> S. Ct. 599, *was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations.*"

The wrongful publicity in *Irvin* extended to defendant's offer to plead guilty if promised a 99-year sentence; that he had confessed to 24 burglaries; that many of the stories described him as "a confessed slayer of six", a parole violator and fraudulent-check artist; that on the day before the trial, the newspapers carried the story that Irvin had orally admitted the murder of the victim in this case, as well as the murder of five other named individuals.

There, too, no less than 268 of the jury panel of 430 were excused on challenges for cause because of fixed opinions as to Irvin's guilt; the maximum number of peremptory challenges were interposed; 90% of all the prospective jurors questioned "entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty."

All these factors in *Irvin* v. *Dowd*, or any combination of them, were completely non-existent in the case at bar.

In *Reynolds* v. *United States* (1879), 98 U.S. 145, this Court stated:

> "*In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best*

fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . The finding of the trial court . . . ought not to be set aside by a reviewing court, unless the error is manifest."

CONCLUSION

The petitioner had been duly convicted under due process of law. The petition for certiorari should be denied.

Dated: Brooklyn, New York,
July 1965.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1964

No. 270

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1964

No. 270

JEROME ROSENBERG,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, unanimously affirming the judgment of the Supreme Court of the State of New York, County of Kings, convicting him of the crime of Murder in the First Degree.

Petitioner had been convicted by verdict of the Jury of the crime of felony murder, without a recommendation for life imprisonment under the New York Penal Law, Section 1045-a.

The opinion of the Court of Appeals of the State of New York is reported in 15 N.Y. 2d 235.

The judgment and warrant of death against petitioner had been duly stayed on April 19, 1965, by the Chief Judge of the Court of Appeals of the State of New York, pending the hearing and determination of this petition for certiorari

On April 22nd, 1965, the Court of Appeals of the State of New York duly amended its judgment to provide that no constitutional rights of the petitioner had been violated under the Fourteenth Amendment of the Constitution of the United States.

Summary of the Facts

The petitioner, Jerome Rosenberg, and his co-petitioner, Anthony Portelli were convicted of felony murder without a recommendation for mercy, and sentenced to death on February 18, 1963, after a trial by Jury before Honorable Samuel S. Leibowitz, a Justice of the Supreme Court of the State of New York, County of Kings (171, 183).*

The indictment charged the petitioners, Portelli and Rosenberg, acting in concert with one Anthony Dellernia,** with Murder in the First Degree in the killing of two detectives, Luke Fallon (First Count), and John Finnegan (Second Count), during the commission of a robbery of a tobacco shop on May 18, 1962. Each of the petitioners was armed with a loaded gun. The slain detectives had been on taxicab patrol duty with the 78th Police Squad at the time of the homicide.

---

* Numerals refer to folio numbers in printed record on appeal.

** A mistrial was declared as to the co-defendant, Dellernia (3563-4). He was retried subsequent to the conviction of the petitioners and was acquitted.

Guilt of each of the co-petitioners, Rosenberg and Portelli, had been established beyond a reasonable doubt. Both of them were doubly identified by David Goldberg and Robert Goldberg, the proprietors of the tobacco shop, as the perpetrators of the killing during the course of the robbery.

Apart from the direct evidence of the identification, the invincible circumstantial evidence adduced against them was such as to exclude to a moral certainty every other reasonable hypothesis than that of their guilt (*People* v. *Razezicz,* 206 N.Y. 249; *People* v. *Harris,* 306 N.Y. 345; *People* v. *Eckert,* 2 N.Y. 2d 126). Thus, as to the petitioner Rosenberg:

• Rosenberg was positively identified by a witness who confronted him face to face, as he ran towards her from the tobacco shop immediately after the commission of the crime (1139-40).

• Rosenberg's hat (Peo. Ex. 26) and his sunglasses (Peo. Ex. 27) were found in an ashcan near the scene of the robbery, along the path of his flight from the tobacco shop.

• It was conclusively established that the hat had been purchased by Rosenberg a week before the robbery at Joe Silver's Haberdashery Store.

• The sunglasses had been loaned to Rosenberg by the witness, Louis Ferrara, at about 2:00 P.M. of the day the robbery was committed. These glasses were distinctively identified by Ferrara's nickname, "Gee", scratched on the inside left earpiece.

• A corroborating witness, Linda Manzione, testified that at 3:00 P.M. of the day of the robbery— barely a half hour before the crime had been committed—she saw Rosenberg and Portelli put the sunglasses and dark hats on as

they left Dellernia's car at 78th Street and New Utrecht Avenue, when Dellernia said, "I'll leave you off here because I don't want to get mixed up in anything" (2679-82).

• She identified People's Exhibits 26 and 27 as similar to the hats and sunglasses she had seen on the petitioner's person at that time (2682-7, 2742).

• As to the .32 Colt Automatic Gun (Peo. Ex. 19), which had been found in a flower bed behind a hedge along the path of Rosenberg's flight from the tobacco shop, Linda Manzione testified that she had seen the very same gun about two weeks before, in Rosenberg's hands, when she observed him loading it with bullets (2649, 2670).

• Again, at 2:00 P.M. of May 18, 1962, the day of the homicide, she had seen Rosenberg walk behind the counter of Dellernia's candy store, and while facing her, she saw the gun slip out of a folded newspaper which he took from the shelf.

• Robert Goldberg testified that, as an experienced ordinance man in the Marine Corps, he recognized the gun in Rosenberg's hand as an automatic, and that it was similar to the weapon used in the tobacco shop robbery (894-899).

• The bullet which was recovered from the ceiling of the tobacco shop was of 32-calibre. It was Rosenberg who had himself informed Robert Goldberg, after a shot was fired, that "the gun went off accidentally" (912-914). Test firings of the .32 Colt Automatic established that the bullet extracted from the ceiling was definitely fired from that weapon (1897-1905), and that the discharged shell found on the floor of the tobacco shop shortly after the homicide had been fired from the same automatic (1908-11, 1928).

• Louis Ferrara testified that at 10:30 A.M. on the day of the robbery, he had overheard a conversation between petitioner and Anthony Dellernia in which Rosenberg mentioned the word "score", meaning a robbery (2154-5).

• A short time later, at about 10:55 A.M., he saw Rosenberg and Portelli with each other right next to Dellernia's candy store.

• Among other salient aspects of the circumstantial proof, it was established by witnesses outside the tobacco shop immediately after the shooting had occurred, that the persons running from the scene of the homicide fairly fitted the two defendants' physical description and attire.

• Max Graup, a resident of that vicinity, saw a slim man, about 5 feet, 6 inches in height (fitting petitioner's description) running out of the tobacco shop shortly after hearing a sound like "three firecracker shots". The man wore a black hat, black shoes and dark glasses; there was a gun in his right hand as well as a spotted red rag (785-797); and the man had been running along the path where these items of evidence were found shortly after the homicide (791-2).

• Likewise, two young school boys observed two persons running from the scene, fitting the defendants' description, shortly after they heard a sound like "firecrackers" (836-841, 860-2).

• The two Goldbergs both observed that Rosenberg had held a white cloth with a red ink stain on it, which Rosenberg had used to cover his face during the course of the robbery (612-613; 914-917).

A red ink-stained white towel had been discovered in the ashcan together with Rosenberg's hat and the sunglasses. The towel was identified as one exclusively belonging to the tobacco shop, containing a special red dye used for the cigarette tax machine of the Boro Park Tobacco Shop (1493-1504, 1511-23).

Neither petitioner, nor Portelli, took the stand in their own defense.

The judgment of conviction had been unanimously affirmed by the New York Court of Appeals under its plenary right and power to review issues of law and fact in a capital case "whether any exceptions shall have been taken or not in the Court below", as mandated by *New York Const. Art 6 Sec. 7* and *New York Code Crim. Pro. Secs. 517 and 528* (*People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Nelson,* 189 N.Y. 137, 81 N.E. 768; *People* v. *Creasy,* 236 N.Y. 205, 140 N.E. 563; *People* v. *Crum,* 272 N.Y. 348, 6 N.E. 2d 51; *People* v. *Peller,* 291 N.Y. 438, 52 N.E. 2d 949; *People* v. *Leyra,* 302 N.Y. 353, 98 N.E. 2d 553).

POINT ONE

The due process requirements of full and fair disclosure of all the facts surrounding the testimony of the witness Melville were fully satisfied.

I

The New York Court of Appeals held at bar:

> *"Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury.* (See 3 Wigmore, Evidence (3d ed., 1940), Sec. 815, pp. 230-231). *The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.*
>
> *In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct."*

The due process test applicable to the testimony of a witness is that of full and fair disclosure of all the facts affecting his credibility. (*Mooney* v. *Holahan,* 294 U.S. 103, 112; *Pyle* v. *Kansas,* 317 U.S. 213; *Napue* v. *Illinois,* 360 U.S. 264; *Brady* v. *State of Maryland,* 373 U.S. 83; *United States ex rel. Meers* v. *Wilkins,* 2nd Cir. 326 F. 2d 275, 282; *People* v. *Savvides,* 1 N.Y. 2d 554; *People* v. *Zimmerman,* 10 N.Y. 2d 430; *People* v. *Mangi,* 10 N.Y. 2d 86; *People* v. *Robertson,* 12 N.Y. 2d 355; *People* v. *Fazio,* 14 N.Y. 716.

After testifying that he had been beaten by the police before disclosing to them that Portelli had made a detailed confession of the crime to him, Melville unequivocally told the jury at the trial that his testimony was the absolute truth, as was the testimony that he had given to the Grand Jury (1759-60).

Likewise, Fernanda Melville, his wife, affirmed the truthfulness of her testimony before this jury, notwithstanding her statement that she had previously been in fear regarding their involvement in this case (2482-90).

The District Attorney, in his summation, told the jury:

> "We come to Richard Melville and to Richard Melville's wife Fernanda. He testified that when he was in the precinct on Sunday night at about 10:30, he was beaten; he was kicked; he was assaulted with cigarette butts held by the police and put to the back—to his back; that he was in such pain and in such suffering—I don't condone those actions. I don't condone them on the part of the police or anyone else, and particularly, the police. It is an absolute outrage in these times where people have to be subjected to that practice and to that conduct, to go through that pain and suffering by these police.

> Notwithstanding their enthusiasm, notwithstanding their eagerness to get the proper defendant, they had no business to do that which was described by Melville, and it shall not rest here either. But yet, during the two and a half hours of these pains and these sufferings through which this man experienced, he said he didn't know Portelli. He said he didn't know Rosenberg, and he said he didn't know Dellernia.
>
> But the fact of the matter is that he knew Portelli and for two and a half hours he denied that he knew him. So when he admitted under this pain and this assault by the cops upon him, he admitted that he knew Portelli, and the fact remains that defense counsel, in putting this woman on the stand, Mrs. Frankolino, she admits that she knew Portelli, and that her brother Frank Lino was a friend of Portelli" (3921-4).

And the Court, training the searchlight of truth on the credibility of the witness, forthrightly charged the jury as follows:

> "Now the question is, did he confess to Melville? What about Melville? Who is Melville? What is his background? He is an ex-convict. He is a bookmaker living outside of the pale of the law. He is a no good loafer. I wouldn't trust him further than I could 'throw a stick,' based on his background. Now I can't be any more forthright than that, can I? I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the case which backed him up, evidence that I believed beyond a reasonable doubt" (4145-6).

* * * and further, at fols. 4149-54:

"Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him an unmerciful beating, which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'given the works,' as they say by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.

What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station house, deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the manner that Mr. Selzer did, and in the manner that the other attorneys did too. But what about his testimony? Is his testimony to be ruled out, to be dis-

> regarded just because the cops gave him a beating, and for no other reason?
>
> The answer to that question is no. It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.
>
> I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Thus, unlike the cases dealing with coerced confessions of an accused, all bearing the imprint of an "inherent untrustworthiness" (*Spano* v. *New York,* 360 U.S. 315, 320-321) and "probable unreliability" (*Jackson* v. *Denno,* 12 L. ed. 2d 908, 921), Melville's testimony was vested with the imprimatur of credibility under the careful and circumspect instructions of the trial court.

What is decisive as to the due process claim by petitioner is that the witness' testimony as such in no way violated petitioner's right against self-incrimination, for Portelli's confession to the witness was indisputably voluntary and uncoerced.

Hence, this is not a case where the State "wrings a confession out of an accused against his will" (*Blackburn* v. *Alabama,* 361 U.S. 199); or deigns to "prove a charge against an accused out of his own mouth" (*Malloy* v. *Hogan,* 377 U.S. 1, 12 L. ed. 2d 653, 659); or infringes in the slightest degree on the irretractable principle of criminal justice that "the rack and torture chamber may not be substituted for the witness stand." (*Brown* v. *Mississippi,* 297 U.S. 278).

The underlying fallacy of petitioner's argument is that it is hoisted on the entirely erratic premise that Melville's testimony was "coerced testimony" (Pet. Br. p. 15), which it decidedly was not. Quite to the contrary, Melville's *testimony* was wholly voluntary on the witness stand.

It was testimony given under the aegis and protection of the trial Court, with every sanction of cathartic cross-examination available to the petitioner.

Thus, unlike the vicarious impact of admissions resulting from a coerced confession wrung from an accused, this was the uncoerced and direct testimony of a witness given under entirely wholesome credentials of reliability.

In the words of this Court, in *Maddox* v. *United States,* 156 U.S. 237, 242-3, it was testimony which fully satisfied every standard of a fair trial, including

> "* * * *a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*"

This Court's recent decision in *Malloy* v. *Hogan*, 377 U.S. 1, 12 L. ed. 2d 653, is dispositive of the constitutional issue. In *Malloy*, this Court enunciated the new basic constitutional doctrine that the admissibility of a coerced confession in a State criminal prosecution shall be tested not by the due process clause, or "whether the conduct of State officers in obtaining the confession was shocking", but rather, by the standard of the Fifth Amendment's command against self-incrimination.

If, then, as to an *accused*, "the constitutional inquiry is not whether the conduct of state officers in obtaining a confession is shocking, but whether the confession is free and voluntary * * * —in other words, the person must not have been compelled to incriminate himself"—then it logically follows that testimony of *a person other than an accused individual* cannot be constitutionally objected to on that ground, because no right against self-incrimination has been violated.

Accordingly, applied to Melville's testimony, the constitutional inquiry is not as to whether the conduct of the police in obtaining the evidence was "shocking", but solely whether the witness' testimony was given freely and voluntarily, with all-out disclosure to the jury of all the relevant facts, so as to assure to petitioner an absolute fair trial under procedural due process of law.

Rochin v. *Calfornia*, 342 U.S. 165, patently enough, is plainly inapposite. There, the victim of the constitutional deprivation of due process was the *accused* on trial, and not a witness as here.

There, unlike here, the forcible extraction of incriminating evidence from the stomach of the accused—which the

Court properly denounced as "conduct that shocks the conscience"—directly violated the constitutional right *of the accused* against compulsory self-incrimination (*See concurring opinion of Mr. Justices Black and Douglas; Malloy* v. *Hogan, supra*).

Thus, within its own consensus, the reach of *Rochin* cannot constitutionally apply to the situation at bar.

II

In any view of this case, petitioner is utterly without legal standing to urge upon this Court that the insidious tactics practiced by the police against the witness rendered his testimony constitutionally inadmissible.

Directly analogous here is the constitutional proscription against unreasonable searches and seizures, available only as to one "who has standing to complain" (*Jones* v. *United States,* 362 U.S. 257; *Ker* v. *California,* 374 U.S. 23).

The right to due process of law is one personal to the accused. "The rule (*Rochin* v. *California, supra*), does not apply unless the person upon whom the atrocity was committed is the defendant on trial" (*8 Wigmore Evidence, sec. 218a, p. 50, McNaughton Rev. 1961*).

Comporting with our position herein, petitioners made no objection to the admissibility of Melville's testimony, nor did they take exception to the Court's instructions thereon. (See *On Lee* v. *U.S.,* 343 U.S. 747, footnote 3).

III

There is a complete absence of any authority for the proposition urged upon this Court that coercion practiced upon a witness should be equated to the rule governing the admissibility of out-of-court confessions extracted from an accused.

As a practical matter, there is no rational basis for such equation in view of the fundamental differences inhering between the two types of testimony, as already aforenoted.

Again, petitioner's argumentative projection at bar, if ever adopted, could not but lead to results gravely inimical to the public interest and to the sound administration of criminal justice.

The great climactic quest for truth in the judicial process would be seriously compromised in the chaotic shuffle of endless *voir dire* examinations pervading criminal trials.

Consistent with the rote common to coerced confessions generally, the range of inquiry would likewise have to embrace all patterns of coercion: physical violence as well as the "more sophisticated modes of persuasion" (*Blackburn* v. *Alabama,* 361 U.S. 199; *Rogers* v. *Richmond,* 365 U.S. 534; *Hysler* v. *Florida,* 315 U.S. 411, 413).

The broad judicial inquiry would perforce have to apply to sundry testimony from witnesses of diverse nature, whether testifying to a confession as here, or to such other material issues as a disputed identification, or the corroboration of an accomplice, or to matters in rebuttal for the prosecution, among all others.

Typically illustrative of the intolerable stresses to which the judicial process would thus be subjected would be the very case at bar, where practically every one of the People's major witnesses (Louis Ferrara, Linda Manzione, Fernanda Melville, Richard Melville, David Goldberg, Robert Goldberg) would have had to run the gauntlet of *voir dire* examination as to the "competency" of their testimony by advance ruling of the trial court, as had been urged by the petitioner in the Court below.

The demands of due process should not be so stretched as to impose intolerable standards on the fair conduct of a criminal trial, or to fasten "fetters of unreason upon the States" (Mr. Justice Frankfurter, in concurring opinion, *Adamson* v. *Calif.*, 332 U.S. 46).

> *"The problem is that of achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other."*
>
> *People* v. *Waterman*, 9 N.Y. 2d 561.

In *Columbe* v. *Connecticut*, 367 U.S. 568 at p. 588, the Court stated:

> *"Due process does not demand of the states, in their administration of the criminal law, standards of favor to the accused which our civilzation, in its most sensitive expression, has never found it practical to adopt."*

In *Rochin*, this Court laid down the guiding principle, at p. 168:

> *"Due process of law * * * is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice".*

And at p. 172:

> *"Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see Hudson County Water Co.* v. *McCarter,* 209 U.S. 349, 355, 52 L. ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560, *on a judgment not ad hoc and episodic, but duly mindful of reconciling the needs both of continuity and of change in a progressive society".*

POINT TWO

Petitioner Rosenberg received a fair and impartial trial in full accord with due process of law.

Petitioner Rosenberg's contention that he was denied a fair trial is utterly without support in this record. We are certain that the wild and intemperate diatribe against the trial Court will merit no approval in this Court, any more than it did in the New York Court of Appeals below. The State's resolution of this issue should be accorded the finality it is due (*Brown* v. *Allen,* 334 U.S. 443; *Lanza v. New York,* 370 U.S. 139).

The plenary right to review by the Court of Appeals as to all matters affecting a fair trial in a capital case is mandated by Section 528, Code of Criminal Procedure, which provides:

> "* * * *When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below".*

The Court's tender regard for the fair trial rights of an accused is enshrined in a long line of decisions. See *People* v. *Kerrigan,* 147 N.Y. 210, 41 N.E. 494; *People* v. *Sherlock,* 166 N.Y. 180, 59 N.E. 830; *People* v. *Chapman,* 224 N.Y. 463, 121 N.E. 381; *People* v. *Becker,* 210 N.Y. 274, 104 N.E. 396; *People* v. *Ludkowitz,* 266 N.Y. 233, 194 N.E. 688; *People* v. *Cashin,* 259 N.Y. 434, 182 N.E. 74; *People* v. *Mendes,* 3 N.Y. 2d 120, 143 N.E. 2d 801.

The petitioner's claims addressed to the alleged unfairness of the trial judge are wholly chimerical in nature, without any support whatever in the printed record on appeal. Further, it should be here noted that the petitioner's appellate counsel did not represent him upon the trial nor was he present at any stage of the proceedings, and is therefore incompetent to assay the alleged unfairness of the trial beyond the trial record. In fact, the record is devoid of any intimation by exception or otherwise on the part of defense counsel that the Court's instructions to the jury, or its conduct of the trial, were in any way prejudicial to them.

One cannot, therefore, rationally reconcile the petitioner's semantical manipulations and vituperative assault against the conduct of the trial Court with the demonstrated fairness shown to the accused throughout the trial.

In many notable instances, the trial Court manifested a fairness to the accused which in truth spilled over beyond the call of judicial duty. To take some examples at random:

• The Court insisted that Portelli be given an opportunity to call an additional fingerprint expert, and to adjourn the trial for such purpose, after it had developed that his own expert witness had given the surprise testimony that the fingerprint check found on the check was actually that of Portelli (3348-3354).

• The trial judge, on his own initiative, although without objection by defense counsel, rejected a prospective juror for cause, on the basis of his admission that he would be influenced by a detective-relative of his against the defendants on trial (Voir dire Jury, p. 703).

• The trial judge interjected himself in the District Attorney's summation—again without prodding by defense counsel—to dispute the prosecutor's statement to the jury that Rosenberg had been identified by Robert Goldberg. Said the Court at that point (3872):

> "The Court: There is no such testimony, and there has been no objection, but the Court is entering an objection. The Court is entering an objection to your statement that at that time he saw the full face of this defendant. If counsel don't object, the Court objects. You are in error about the evidence on that point."

• In the Court's instructions to the jury, the trial judge flatly stated that only David Goldberg had identified Rosenberg (4069), while the record showed that Robert Goldberg did in fact also identify Rosenberg (901-2, 906-910, 1036-7), and was permitted to make a courtroom identification thereon.

• Following the mistrial as to Dellernia, the trial Court directed that certain important testimony against Rosenberg be stricken from the record, thus giving to the accused a ruling more favorable than that to which he was entitled. (See *People* v. *Klvana,* 241 N.Y. 481, 485; *People* v. *Richardson,* 251 A.D. 916.) For example, the testimony as to the purchase of the murder weapon by Dellernia at Aberdeen, Maryland, under the fictitious name of "Romano" was ruled out of the trial, to petitioners' undue advantage, in the Court's instructions to the jury (4158); again, the evidence of Louis Ferrara that the Rosenberg gun had been placed under the mat of the Dellernia car several hours before the shooting took place on May 18, 1962 was likewise ordered stricken from the Record (3702).

• In contrast, the Court directed that the testimony of the alibi witnesses for Dellernia be considered by the jury "as bearing upon the credibility of Linda Manzione," who had testified that she was together with Dellernia at the time the robbery was committed, as against the testimony of the alibi witnesses that they had been with Dellernia elsewhere at that time (4040-4047).

• The Court set up a solid steel ring of instructions around the credibility of the witness Melville, saying at folio 4146:

> "I wouldn't 'convict a dog' on his testimony, standing alone, much less a human being, unless there was other evidence which backed up his story, which bolstered his credibility. Do you understand what I am saying—unless there was other evidence in the case which backed him up, evidence that I believed beyond a reasonable doubt."

And again at folio 4154:

> "I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

In all, the petitioners had been accorded a completely fair and impartial trial. The fancied accusations against the honor and judicial integrity of the trial judge are simply without basis in the record or otherwise, and should be summarily rejected by this appellate tribunal—just as they were plenarily rejected by the New York Court of Appeals.

POINT THREE

Petitioner was not denied his right to confrontation under the Sixth Amendment.

Although petitioner's defense counsel had not objected to the damaging testimony of Melville that Portelli had told him that he (Portelli) took the money out of the cash register, and that "Jerry took the rest" (1563), the trial Court immediately instructed the jury in the most positive

terms that that evidence was not binding on Rosenberg. In addition, the Court polled the entire jury to assure absolute compliance with the Court's instructions on that issue (1563-1579).

It is petitioner's submission to this Court that "the admonition to the Jury that Portelli's admissions were not binding as to Rosenberg were not only intrinsically ineffective but in fact seemed to have been unmistakeably calculated to accomplish exactly the opposite * * *". (Pet. Br. p. 26)

The petitioner's position is wholly untenable. The Court's emphatic, cautionary instructions to the jury circumscribing Melville's testimony insofar as the petitioner Rosenberg had been implicated, effectively protected the petitioner's right to a fair trial.

"Our theory of trial relies upon the ability of a jury to follow instructions" (*Opper* v. *United States,* 348 U.S. 84; *People* v. *Lobell,* 298 N.Y. 243, 254; *People* v. *Guardino,* 286 N.Y. 132, 135).

In this connection, the petitioner invokes this Court's recent decisions in *Pointer* v. *Texas,* — U.S. —, 13 L ed 2d 923, and *Douglas* v. *Alabama,* — U.S. —, 13 L ed 2d 934.

In the light of the record of this trial, however, it would be sheer sophistry to contend that the right of cross-examination "in exposing falsehood and bringing out the truth" (*Pointer* v. *Texas, supra*), was in any way impinged or impaired. Here, there was "full judicial protection of the defendant's rights of confrontation, of cross-examination, and of counsel" (*Turner* v. *Louisiana,* 379 U.S. 466, 472-3).

In short, the *Douglas-Pointer* decisions of this Court are totally inapposite, for the Confrontation Clause of the Sixth Amendment was in no way here even remotely violated. Full opportunity of cross-examination was afforded to the two defendants on trial. The circumspect instructions of the trial Court adequately served to guarantee to petitioner a fair trial free from error or prejudice.

POINT FOUR

Petitioner was convicted by a fair and impartial jury chosen by the standards of due process of law.

The record of the trial lends no support whatever to petitioner's claim that he had been denied a trial by a fair and impartial jury, and of "a fair due process opportunity to receive a jury recommendation of mercy upon a conviction of felony murder" (Pet. Br. p. 4).

Nor is there any substance to petitioner's claim that the trial jury was selected by "an unconstitutional procedure aimed at excluding persons who might have a truly objective attitude about a recommendation of mercy, and, specifically aimed at excluding persons of the same ethnic or racial background as the respective defendants" (Pet. Br. p. 4).

The detailed transcript of the *voir dire* examination of the jury, to which we respectfully commit this Court, completely negates this spurious and unfounded charge.

Certainly it was the plain right and duty of the Court and prosecutor to weed out "for principal cause" all those who had expressed or indicated conscientious scruples against the death penalty, and to exclude those who could not con-

scientiously apply the stringent law of felony murder (*Walter* v. *People*, 32 N.Y. 147).

This same procedure in the selection of a jury in a capital case was found to present "no tenable due process question" in the capital case of *Edwards* v. *People of the State of New York*, 1 L. ed., 2d 17, 76 S. Ct. 1058.

Petitioner does not, and indeed cannot, point with particularity to any instance where Jewish and Italian jurors were explicitly and deliberately excluded on account of nationality or race. Nor can petitioner cite any instance of a single juror actually selected over the objection of defense counsel on that score or otherwise. Nor can petitioner point to a single instance in the entire *voir dire* where a prospective juror had been particularly questioned as to his views regarding possible leniency or recommendation in connection with a verdict of felony murder.

The fact is that when the jury had been finally selected, defense counsel had still unused one of its remaining peremptory challenges; and defense counsel had in fact expressed themselves as satisfied with the jury as selected (252-3).

The record of the *voir dire* is thus completely devoid of any objection of the tenor so stridently and belatedly urged upon this reviewing Court: (Code Crim. Pro. Sec. 371).

Petitioners' fanciful interpolations in connection with the peremptory challenges exercised by the People are without legal force whatever. The right of peremptory challenge by both prosecution and defense is one absolute in nature, *"for which no reason be given"* (*Code Crim. Pro. Section* 372).

As was held in *Hayes* v. *Missouri*, 120 U.S. 68, at p. 71:

> *"The right to challenge is the right to reject, not to select a juror. If, from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained."*

The Court of Appeals of the State of New York has found no violation of constitutional right.

CONCLUSION

The petitioner has been duly convicted under due process of law.

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
July, 1965.

Respectfully submitted,

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